TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 164.

H. HACKFELD AND COMPANY, LIMITED, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 31, 1903.
CERTIORARI AND RETURN FILED FEBRUARY 16, 1904.

(19,178.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1904.

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United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD AND COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Transcript of Record.

Upon writ of error to the United States district court for the district of Hawaii.

1 UNITED STATES OF AMERICA, *District of Hawaii,* } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Motion to File Information.

Comes now Robert W. Breckons, attorney of the United States in and for the district of Hawaii, and moves the court now here for permission to file an information against H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, charging the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, with a violation of the provisions of section 10 of an act of the Congress of the United States of America, entitled: "An act in amendment of the various acts relative to immigrants and the importation
2 of aliens under contract or agreement to perform labor;" approved March 3, 1891.

ROBERT W. BRECKONS,
United States Attorney in and for the District of Hawaii.

(Endorsed:) Title of court and cause. Filed Dec. 22d, 1902. W. B. Maling, clerk, by F. L. Hatch, D. C.

From Minutes United States District Court, vol. II, page 161, Monday, December 22d, 1902.

Order Granting Motion to File Information.

(Title of Court and Cause.)

Upon presentation of the information filed by Robert W. Breckons, attorney for the United States in and for the district of Hawaii, supported by the oath of E. R. Stackable, and on motion of the said district attorney:

It is hereby ordered that said information be filed, and that the clerk of this court do issue a summons in this cause directed to the defendant, H. Hackfeld & Co., Ltd., a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, directing said defendant to appear before the judge of this court, in the court room of the United States district court for this district, on the 12th day of January, A. D. 1903, to answer the charge contained in the information; said summons to state generally the nature of the charge contained in said information and to be accompanied by a certified copy of the information in this cause.

3 UNITED STATES OF AMERICA, *District of Hawaii,* } *ss:*

In the District Court of the United States within and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Information.

First count.

Be it remembered, that Robert W. Breckons, attorney of the United States of America, who for the said United States in this behalf prosecutes, in his own person comes now into the district court of the United States of America, for the district aforesaid, on this 22d day of December, of the same term, and for the said United States of America, gives the court here to understand and be informed, that one H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the dis-

trict aforesaid, was the agent of the steamship "Korea," a ves-
4 sel plying between the State of California and the Empire of Japan, and on said 12th day of November, A. D. 1902, in said district, did refuse to receive back on board said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immigrants, then and there unlawfully in the United States of America, and who lately before then, to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled; "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

Second count.

And the said attorney of the United States, who prosecutes as aforesaid for the United States, further gives the court here to understand and be informed that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan, and on the said 12th day of November, A. D. 1902, in said district, did neglect to detain on said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immi-
5 grants, who lately before then, to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States of America, to wit, to the port of San Francisco and State of California on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

Third count.

And the said attorney of the United States, who prosecutes as aforesaid, for the said United States of America, further gives the court here to understand and be informed that the said H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse and neglect to re-

turn to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America, the said Terujiro Yamato and the said Hachiero Irie having lately before then, to wit, on the
6 28th day of October, A. D. 1902, unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel, contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

Whereupon, the said attorney of the said United States, who prosecutes as aforesaid for the said United States of America, prays the consideration of the court in the premises, and that due process of law may be awarded against said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, in this behalf to make it answer to the said United States of America concerning the premises aforesaid.

ROBERT W. BRECKONS,
United States Attorney for the District of Hawaii.

7 UNITED STATES OF AMERICA, } ss:
District of Hawaii, }

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Affidavit of E. R. Stackable.

E. R. Stackable, being first duly sworn according to law, deposes and says that he is the collector of customs of the United States in and for the district of Hawaii; that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse to receive back on board of said vessel "Korea" one Terujiro Yamoto and one Hachiero

Irie, Japanese immigrants then and there unlawfully in the
8 United States of America, and who lately before them, to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

And the said E. R. Stackable further deposes and says that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in the said district did refuse to detain on board said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immigrants, who lately before them, to wit, on the twenty-eighth day of October, A. D. 1902, did unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled

"An act in amendment of the various acts relative to immi-
9 grants and the importation of the aliens under contract of agreement to perform labor;" approved March 3, 1891, and against the peace and dignity of the United States of America.

And the said E. R. Stackable further deposes and says that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse and neglect to return to the port from whence they came, to wit, the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America, the said Terujiro Yamoto and the said Hachiero Irie, having lately before then, to wit, on the 28th day of November, A. D. 1902, unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the forms of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract of agreement to perform labor;"

approved March 3, 1891; and against the peace and dignity of the United States of America.

E. R. STACKABLE,
Collector of Customs of the United States for the District of Hawaii.

10 Subscribed and sworn to before me this 22d day of December, A. D. 1902.

[SEAL.] FRANK L. HATCH,
Deputy Clerk United States District Court, Territory of Hawaii.

(Endorsed:) Title of court and cause. Information. Filed December 22d, 1902. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

UNITED STATES OF AMERICA, *District of Hawaii,* } ss:

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Summons.

The President of the United States of America to H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, defendant, Greeting:

11 You are hereby notified that a criminal information against you has on this 22d day of December, A. D. 1902, been filed in the office of the clerk of the district court of the United States for the Territory of Hawaii, charging that on the 12th day of November, A. D. 1902, you were the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and that on said 12th day of November, A. D. 1902, you did refuse to receive back on board of said vessel, and that you did on said day refuse to detain on board said vessel, that you did on said day refuse and neglect to return to the port from whence they came one Terujiro Yamoto and one Hachiero Irie, two certain Japanese immigrants then and there unlawfully in said United States of America, the said Terujiro Yamoto and the said Hachiero Irie having lately before then, to wit, on the 28th day of October,

A. D. 1902, unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the said United States of America; a certified copy of which said information, together with the affidavit in support thereof, is hereto attached.

12 You are hereby directed to appear and answer to the charge contained in said information upon file against you in the district court of the United States in and for the Territory of Hawaii, on or before the twelfth day of January, A. D. 1903.

Witness the Honorable Morris M. Estee, judge of said district court, this 22d day of December, A. D. 1902, and of the Independence of the United States the one hundred and twenty-seventh.

[SEAL.] W. B. MALING,
Clerk U. S. District Court, Territory of Hawaii,
By FRANK L. HATCH,
Deputy Clerk.

UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

In the District Court of the United States within and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Information.

First count.

13 Be it remembered, that Robert W. Breckons, attorney of the United States of America, who for the said United States in this behalf prosecutes, in his own person comes now into the district court of the United States of America, for the district aforesaid, on this 22d day of December, of the same term, and for the said United States of America, gives the court here to understand and be informed, that one H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the

Empire of Japan, and on said 12th day of November, A. D. 1902, in said district, did refuse to receive back on board said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immigrants, then and there unlawfully in the United States of America, and who lately before then, to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

14 Second count.

And the said attorney of the United States, who prosecutes as aforesaid for the said United States, further gives the court here to understand and be informed that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan, and on the said 12th day of November, A. D. 1902, in said district, did neglect to detain on said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immigrants, who lately before then to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States of America, to wit, to the port of San Francisco and State of California on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

Third count.

15 And the said attorney of the United States, who prosecutes as aforesaid, for the said United States of America, further gives the court here to understand and be informed that the said H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November A. D. 1902, in said district, did refuse and neglect to return to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese

immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America, the said Terujiro Yamato and the said Hachiero Irie, having lately before then, to wit, on the 28th day of October, A. D. 1902, unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California on said vessel, contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

Whereupon the said attorney of the said United States, who prosecutes as aforesaid for the said United States of America, prays the consideration of the court in the premises, and that due process of law may be awarded against said H. Hackfeld & Company, Lim-
16 ited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, in this behalf to make it answer to the said United States of America concerning the premises aforesaid.

ROBERT W. BRECKONS,
United States Attorney for the District of Hawaii.

UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Affidavit of E. R. Stackable.

E. R. Stackable, being first duly sworn according to law, deposes and says that he is the collector of customs of the United States in and for the district of Hawaii; that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State
17 of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse to receive back on board of said vessel "Korea" one Terujiro Yamoto

and one Hachiero Irie, Japanese immigrants then and there unlawfully in the United States of America, and who lately before then, to wit, on the 28th day of October, A. D. 1902, did unlawfully come to the United States, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America entitled "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

And the said E. R. Stackable further deposes and says that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse to detain on board said vessel "Korea" one Terujiro Yamoto and one Hachiero Irie, Japanese immigrants, who lately before then, to wit,

on the twenty-eighth day of October, A. D. 1902, did unlaw-
18 fully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the form of the statute in such case made and provided, to wit, section 10 of an act of the Congress of the United States of America, entitled "An act in amendment of the various acts relative to immigrants and the importation of the aliens under contract of agreement to perform labor;" approved March 3, 1891, and against the peace and dignity of the United States of America.

And the said E. R. Stackable further deposes and says that the said H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, on the 12th day of November, A. D. 1902, within the district aforesaid, was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan; and on said 12th day of November, A. D. 1902, in said district, did refuse and neglect to return to the port from whence they came, to wit, the port of Yokohama, in the Empire of Japan, t-o certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America, the said Terujiro Yamoto and the said Hachiero Irie having lately before then, to wit, on the 28th day of November, A. D. 1902, unlawfully come to the United States of America, to wit, to the port of San Francisco, in the State of California, on said vessel; contrary to the forms of the statute in such case made and provided, to wit, section 10 of an

act of the Congress of the United States of America, entitled
19 "An act in amendment of the various acts relative to immigrants and the importation of aliens under contract or agree-

ment to perform labor;" approved March 3, 1891; and against the peace and dignity of the United States of America.

E. R. STACKABLE,
Collector of Customs of the United States for the District of Hawaii.

Subscribed and sworn to before me this 22d day of December, A. D. 1902.

[SEAL.] FRANK L. HATCH,
Deputy Clerk United States District Court, Territory of Hawaii.

UNITED STATES OF AMERICA, } ss:
Territory of Hawaii, City of Honolulu, }

I, Walter B. Maling, clerk of the district court of the United States of America, in and for the Territory of Hawaii, do hereby certify the foregoing to be *a* full, true and correct copies of the original information and affidavit in the case of The United States *vs.* H. Hackfeld & Co., Ltd., as the same remains of record and on file in the office of the clerk of said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said district court this 22d day of December, A. D. 1902.

[SEAL.] W. B. MALING,
Clerk of the United States District Court, Territory of Hawaii,
By FRANK L. HATCH,
Deputy Clerk.

Return on Service of Writ.

UNITED STATES OF AMERICA, } ss:
District of Hawaii, }

I do hereby certify and return that I served the annexed summons on the therein named defendants, by handing to and leaving a true and correct copy thereof, together with a copy of information and affidavit, with F. W. Klebahn, secretary of H. Hackfeld & Co., Ltd., personally, at Honolulu in said district on the 22d day of December, A. D. 1902.

E. R. HENDRY,
U. S. Marshal.

(Endorsed:) Title of court and cause. Summons. Filed December 22d, 1902. W. B. Maling, clerk.

21 From the Minutes of the U. S. District Court, vol. II, page 165, Monday, December 29, 1902.

Trial.

(Title of Court and Cause.)

And now comes the United States, by its attorney, Robert W. Breckons, Esq., and also comes the defendant, H. Hackfeld and Company, Limited, by its attorneys, Kinney, Ballou & McClanahan, and by consent of the court said attorneys are permitted to enter the plea of said defendants in writing, which said written plea and said consent are in words and figures following to wit:

In the District Court of the United States, Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Defendant's Plea.

Now comes H. Hackfeld & Co., Ltd., the above-named defendant corporation, by its attorneys, Kinney, Ballou & McClanahan,
22 and enters this its plea of not guilty to the information filed herein by Robert W. Breckons, United States attorney for the district of Hawaii, and dated the 22d day of December, 1902.
Dated at Honolulu H. T., this 29th day of December, 1902.

H. HACKFELD & COMPANY, LIMITED,
By KINNEY, BALLOU & McCLANAHAN,
Its Attorneys.

I, Morris M. Estee, judge of the above-entitled court, do hereby consent to the making of the plea of the defendant in the above-entitled cause, by its attorneys, Kinney, Ballou & McClanahan, and by the consent of the district attorney, and do hereby order that the same may be entered of record.
Dated at Honolulu, this 29th day of December, A. D. 1902."

MORRIS M. ESTEE,
Judge of the District Court of the United States, Territory of Hawaii.

And it was further ordered that the trial of this case be had on Tuesday, December 30th, 1902, at 10 o'clock a. m.

23 In the District Court of the United States, Territory of Hawaii, October Term, 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Defendant's Plea.

Now comes H. Hackfeld & Co., Limited, the above-named defendant corporation, by its attorneys, Kinney, Ballou & McClanahan, and enters this its plea of not guilty to the information filed herein by Robert W. Breckons, United States attorney for the district of Hawaii, and dated the 22d day of December, 1902.

Dated at Honolulu H. T., this 29th day of December, 1902.

H. HACKFELD & COMPANY, LIMITED.
By KINNEY, BALLOU & McCLANAHAN
(E. B. M.), *Its Attorneys.*

I, Morris M. Estee, judge of the above-entitled court, do hereby consent to the making of the plea of the defendant in the above-entitled cause, by its attorneys, Kinney, Ballou & McClanahan, and by the consent of the district attorney, and do hereby order that the same may be entered of record.

24 Dated at Honolulu, this 29th day of December, A. D. 1902.

MORRIS M. ESTEE,
Judge of the District Court of the United States, Territory of Hawaii.

(Endorsed:) Title of court and cause. Defendant's plea. Filed December 29th, 1902, at 10 a. m. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

UNITED STATES OF AMERICA, *District of Hawaii,* } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Stipulation Waiving Jury.

It is hereby stipulated by and between the respective parties plaintiff and defendant in the above-entitled cause that a jury be

waived, and that said cause may be heard before the Honorable Morris M. Estee, judge of the district court of the United
25 States in and for the district and Territory of Hawaii. Jury waived on Tuesday, the 30th day of December, A. D. 1902, or any day thereafter.

Dated at Honolulu, T. H., this 30th day of December, A. D. 1902.

ROBERT W. BRECKONS,
Attorney for Plaintiff.
KINNEY, BALLOU & McCLANAHAN,
Attorneys for Defendant.

(Endorsed:) Title of court and cause. Stipulation waiving jury. Filed, December 30th, 1902. W. B. Maling, clerk. Frank L. Hatch, deputy clerk.

UNITED STATES OF AMERICA, }
District of Hawaii, } ss:

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Stipulation as to Facts.

The United States of America, the plaintiff in the above-
26 entitled action, through and by Robert W. Breckons, attorney of the United States, in and for the district and Territory of Hawaii, and H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, through and by its counsel, Messrs. Kinney, Ballou and McClanahan, do hereby agree and stipulate that on the trial of this cause, the following shall be taken as the facts, and all the facts, in said cause and that the jury herein, under the instructions of the court, or the court herein, should the trial by jury be waived, shall determine the cause upon the facts, and none other.

First. That the defendant herein, H. Hackfeld & Company, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii.

Second. That on the 12th day of November, A. D. 1902, within the district and Territory of Hawaii, the said defendant was the agent of the steamship "Korea," a vessel plying between the State of California and the Empire of Japan.

Third. That on the 28th day of October, A. D. 1902, the said

steamship "Korea" did bring into the port of San Francisco, in the United States, one Terujiro Yamoto and one Hachiero Irie, two Japanese persons from Yokohoma in the Empire of Japan.

Fourth. That on the 29th day of October A. D. 1902, the said Terujiro Yamoto and the said Hachiero Irie were denied admission into the United States by the board of special inquiry, at the port of San Francisco, in the State of California.

27 *Fifth.* That the board so denying admission to the said Terujiro Yamoto and the said Hachiero Irie was regularly constituted, and had jurisdiction to hear and determine the right of the said Terujiro Yamoto and the said Hachiero Irie to land in the United States.

Sixth. That on the said 29th day of October, A. D. 1902, the said board did order the deportation of said Japanese immigrants.

Seventh. That on the seventh day of November, A. D. 1902, said Japanese immigrants were taken from the port of San Francisco to the steamship "Korea," and were received on board of said steamship for the purpose of deporting them to Japan.

Eighth. That on the 12th day of November, A. D. 1902, the said steamship "Korea" did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship "Korea" at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at twelve o'clock, midnight, of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and five o'clock on the morning of the 13th day of November A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly twenty-five feet above the water; that this method of escape could not have been reasonably anticipated by the

28 master or officers or agents of said steamship "Korea;" that said escape did not occur by *vis major*, or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.

Ninth. That the said defendant made search for said escaped immigrants but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan.

ROBERT W. BRECKONS,
Attorney of the United States in and for the District and Territory of Hawaii.

KINNEY, BALLOU & McCLANAHAN,
Attorneys for H. Hackfeld & Company, Limited, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii.

H. HACKFELD & CO., LTD.
H. A. ISENBERG, *2d Vice-President.*

(Endorsed:) Title of court and cause. Stipulation as to facts. Filed December 30th, 1902. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

29 From Minutes of the United States District Court, vol. II, page 166, Tuesday, Dec. 30th, 1902.

Order Submitting Cause.

(Title of Court and Cause.)

This cause coming on now to — heard on the information heretofore filed herein by R. W. Breckons, Esq., United States attorney, and the plea of the defendant of not guilty heretofore entered herein, and said defendant now appears by its attorneys, Kinney, Ballou & McClanahan, and in open court files its waiver to a jury and agrees that this cause may be heard and determined by the judge of this court without intervention of a jury. And thereupon this cause comes on for trial by agreement with the parties herein. And thereupon the parties thereto, The United States, by its attorney, R. W. Breckons, Esq., and said defendant, by its attorneys, Kinney, Ballou & McClanahan, stipulate in writing as to the facts, and all the facts herein, and submit its cause upon said stipulation, said stipulation being ordered by the court placed upon file, and thereupon after argument of respective counsel this case is by the court taken under advisement.

30 UNITED STATES OF AMERICA, } *ss:*
District of Hawaii, }

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Finding, Judgment, and Sentence.

This cause coming on now to be heard, and it now appearing to the court that the defendant herein has duly and regularly waived a trial by jury in this cause, and that the plaintiff and defendant have submitted said cause on a stipulation as to the facts, and the court being now fully advised in the premises—

Doth find that said defendant, H. Hackfeld & Company, Limited,

a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, did, on the 12th day of November, A. D. 1902, refuse and neglect to return to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America.

31 2.

And the court doth further find said defendant guilty in manner and form as charged in the information herein; to which said finding of the court the said defendant now and here excepts.

And now on motion of Robert W. Breckons, attorney of the United States in and for the district and Territory of Hawaii, the said defendant, H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, by its agent and counsel, appears in court, and it being demanded of it, through its agent and counsel, what it has to say, or can say, why the sentence of the law, upon the finding of the court of guilty, on this day, shall not now be pronounced against it, it says that it has nothing further or other to say than it has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said defendant, H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, do pay a fine of six hundred dollars ($600.00).

And it is further considered by the court that the United States do have and recover all of their costs in and about this prosecution expended, and that it have execution for said fine and said costs.

Honolulu, Hawaii, January 3d, A. D. 1903.

MORRIS M. ESTEE, *Judge.*

32 (Endorsed:) Title of court and cause. Findings, judgment and sentence. Filed, January 3d, 1903. W. B. Maling, clerk, by Frank L. Hatch, deputy clerk. Entered in J. & D. Book, pages 109 and 110, F. L. H.

From Minutes United States District Court, vol. II, page 169, Saturday, January 3d, 1903.

Judgment.

(Title of Court and Cause.)

This cause coming on now to be heard, and it now appearing to the court that the defendant herein has duly and regularly waived a trial by jury in this cause, and that the plaintiff and defendant have submitted said cause on a stipulation as to the facts, and the ocurt being now fully advised in the premises—

Doth find that said defendant, H. Hackfeld and Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, did on the 12th day of November, A. D. 1902, refuse and neglect to return to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America, and the court doth further find said defendant guilty in manner and form as charged in the information herein; to
33 which said finding of the court the said defendant now and here excepts. And now on motion of Robert W. Breckons, attorney of the United States in and for the district and Territory of Hawaii, the said defendant, H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, by its agent and counsel, appears, in court, and it being demanded of it, through its agent and counsel, what it has to say, or can say, why the sentence of the law, upon the finding of the court of guilty, on this day, shall not now be pronounced against it, it says that it has nothing further or other to say than it has heretofore said.

2.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said defendant H. Hackfeld & Company, Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, do pay a fine of six hundred dollars ($600.00).

And it is further considered by the court that the United States do have and recover all their costs in and about this prosecution expended, and that it had execution for said fine and said costs.

To which sentence said defendant duly excepted and gave notice of motion for a new trial.

34 UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Exception to Judgment.

Now comes the above-named defendant, by its attorneys, Kinney, Ballou & McClanahan, and enters this, its exception to the finding,

judgment and sentence of the above-entitled court in the above-entitled matter, rendered on the 3d day of January, A. D. 1903, as being contrary to the law and the evidence, and contrary to the law as applicable to the stipulated facts in said cause.

Dated this 9th day of January, A. D. 1902.

KINNEY, BALLOU & McCLANAHAN,
Attorneys for H. Hackfeld & Co., Ltd., Defendant.

(Endorsed): Title *to* court and cause. Exception to judgment. Filed January 9th, 1903, at 10:10 a. m. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

35 UNITED STATES OF AMERICA, } *ss.*
District of Hawaii, }

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Petition for Writ of Error and Supersedeas.

H. Hackfeld & Company, Limited, an Hawaiian corporation, defendant in the above-entitled cause, feeling itself aggrieved by the finding, judgment and sentence rendered by the above-entitled court and by the judgment entered in the above-entitled cause, comes now by Kinney, Ballou and McClanahan, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the United States circuit court of appeals for the ninth circuit, under and according to the laws of the United States in that behalf made and provided, and also that an
36 order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner, will ever pray.

Dated this 9th day of January, A. D. 1903, at Honolulu, T. H.

H. HACKFELD & COMPANY, LIMITED,
Defendant,
By KINNEY, BALLOU & McCLANAHAN,
Its Attorneys.

UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Order Allowing Writ of Error.

37 Upon motion of E. B. McClanahan, Esq., of the firm of Kinney, Ballou and McClanahan, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be had and is allowed to have reviewed in the United States circuit court of appeals for the ninth circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at $1200, twelve hundred dollars.

Dated this ninth day of January, A. D. 1903, at Honolulu, T. H.

MORRIS M. ESTEE,
Judge United States District Court in and for the District and Territory of Hawaii.

(Endorsed:) Title of court and cause. Petition for a writ of error and supersedeas. Filed January 9th, 1903, at 10 o'clock and 15 minutes a. m. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

38 UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Assignment of Errors.

Comes now the defendant and files the following assignment of error, upon which it will rely in its prosecution of the writ of error filed in the above-entitled cause:

1.

That the above-entitled court erred in rendering judgment against defendant in said cause upon the pleadings in said cause, and that said judgment is contrary to law and the facts as stated in the pleadings in said cause.

Wherefore, the said H. Hackfeld & Company, Limited, plaintiff in error, prays that the judgment of the district court of the United States, in and for the district and Territory of Hawaii, be re-
39 versed, and that the said district court be directed to grant a new trial of said cause.

2.

Dated this 9th day of January, A. D. 1903, at Honolulu, T. H.

KINNEY, BALLOU & McCLANAHAN,
Attorneys for Defendant-, Plaintiffs in Error.

(Endorsed:) Title of court and cause. Assignment of error. Filed January 9th, 1903, at 10 o'clock and 20 minutes a. m. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

UNITED STATES OF AMERICA, *District of Hawaii,* } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Appeal Bond.

Know all men by these presents that we, H. Hackfeld and Company, Limited, an Hawaiian corporation, as principal, and
40 J. F. Humberg and H. Schultze, of the city of Honolulu, Territory of Hawaii as sureties, are held and firmly bound unto The United States of America, plaintiff, above-named, in the sum of twelve hundred dollars ($1200.00) to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated the 9th day of January, A. D. 1903.

Whereas, the above-named defendant, H. Hackfeld and Company, Limited, has sued out a writ of error to the United States circuit court of appeals for the ninth circuit, to reverse the judgment in the above-entitled cause by the district court of the United States in and for the district and Territory of Hawaii.

Now, therefore, the condition of this obligation is such that if the above-named H. Hackfeld and Company, Limited, shall prosecute said writ to effect and answer all costs, both those which have already accrued in the above-entitled court and those which may accrue in the circuit court of the United States for the ninth circuit, and shall pay the judgment of six hundred dollars heretofore interposed against it by said judgment, if it shall fail to make good
41 its plea, then this obligation shall be void, otherwise to remain in full force and effect.

H. HACKFELD AND CO., LTD.
W. PFOTENHAUER, *Director.* [SEAL.]
F. J. HUMBERG. [SEAL.]
H. SCHULTZE. [SEAL.]

UNITED STATES OF AMERICA, }
District of Hawaii, } *ss:*

J. F. Humberg and H. Schultze, parties to the above bond, being duly sworn, do depose and say, each for himself, that he is a resident freeholder in said Territory; that he is worth the sum of $1200 (twelve hundred dollars) over and above his debts and liabilities, and that his property is situate in said Territory and subject to execution.

F. J. HUMBERG.
H. SCHULTZE.

Subscribed and sworn to before me this 15th day of January, A. D. 1903.

[SEAL.] FRANK L. HATCH,
Deputy Clerk, United States District Court, Territory of Hawaii.

The above bond is hereby approved.

MORRIS M. ESTEE,
Judge of said Court.

(Endorsed:) Title of court and cause. Appeal bond. Filed January 15th, 1903. W. B. Maling, clerk. By Frank L. Hatch, deputy clerk.

42 UNITED STATES OF AMERICA, *Territory of Hawaii,* } *ss:*

In the District Court of the United States in and for the Territory and District of Hawaii.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii. } No. 87.

Clerk's Certificate to Transcript.

I, Walter B. Maling, clerk of the district court of the United States for the Territory and district of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 40, inclusive, *is* a true and complete transcript of the record and all proceedings had in said court in the cause of The United States *vs.* H. Hackfeld and Company, Limited (a corporation), as the same remains of record and on file in my office, and that the same constitute the return to annexed writ of error, and I further certify that I hereto annex and herewith transmit the original citation on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is $11.35, and that said amount was paid by plaintiff in error,

43 In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 19th day of January, A. D. 1903.

[SEAL.] WALTER B. MALING, *Clerk.*

UNITED STATES OF AMERICA, *Territory of Hawaii,* } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD & COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Writ of Error.

The President of the United States of America to the Honorable M. M. Estee, judge of the district court of the United States in and for the district and Territory of Hawaii:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said district court be-

44 fore you, between The United States of America, plaintiff, and H. Hackfeld & Company, Limited, defendant, an error has

happened, to the prejudice and damage of the said defendant, H. Hackfeld and Company, Limited, as is cited and appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said circuit court on the 2d day of February, A. D. 1903, that the record and proceedings aforesaid be inspected, that said circuit court of appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 9th day of January, A. D. 1903.

Attest my hand and seal of the United States district court for the district and Territory of Hawaii, at the clerk's office at Honolulu, Oahu, Territory of Hawaii, on the day and year last above written.

[SEAL.] W. B. MALING,
Clerk United States District Court in and for the District and Territory of Hawaii.

45 Allowed this 9th day of January, A. D. 1903.

MORRIS M. ESTEE,
Judge of the District Court of the United States in and for the District and Territory of Hawaii.

(Endorsed:) No. 87. District court, United States Territory of Hawaii. United States of America *vs.* H. Hackfeld & Co., Ltd. Writ of error. Filed January 9, 1903. W. B. Maling, clerk.

UNITED STATES OF AMERICA, } ss:
District of Hawaii, }

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD AND COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendant.

Citation.

The President of the United States of America to Robert W. Breckons, attorney for the United States of America in and for the district and Territory of Hawaii, Greeting:

46 You are hereby cited and demanded to be and appear at the United States circuit court of appeals for the ninth circuit, to be held in the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to the writ of error filed in the clerk's office of the district court of the United States in and for the district and Territory of Hawaii, wherein The United States of America is plaintiff and H. Hackfeld and Company, Limited, is defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 9th day of January, A. D. 1903, and of the Independence of the United States, the 127th.

MORRIS M. ESTEE,
Judge of the District Court of the United States in and for the District and Territory of Hawaii.

Attest:

[SEAL.] W. B. MALING, *Clerk.*

47 UNITED STATES OF AMERICA, *District of Hawaii,* } *ss:*

In the District Court of the United States in and for the District and Territory of Hawaii, October Term, A. D. 1902.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. HACKFELD AND COMPANY, LIMITED, a Corporation Organized and Existing under and by Virtue of the Laws of the Territory of Hawaii, Defendants.

Marshal's Return.

I hereby certify that I served the within citation upon Robert W. Breckons, attorney for the United States of America, in and for the district and Territory of Hawaii, on the 9th day of January, A. D. 1903, at the city of Honolulu, in the district and Territory of Hawaii, by then and there delivering to said Robert W. Breckons personally a true copy of the within citation.

Dated at Honolulu, in the district and Territory of Hawaii, this 9th day of January, 1903.

E. R. HENDRY,
United States Marshal.

(Endorsed:) No. 87. District court, United States Territory of Hawaii. United States of America *vs.* H. Hackfeld & Co., Ltd. Citation. Filed January 9, 1903. W. B. Maling, clerk.

48 (Endorsed:) No. 940. In the United States circuit court of appeals for the ninth circuit. H. Hackfeld & Company, Limited, plaintiff in error, *vs.* The United States of America, defendant in error. Transcript of record. Upon writ of error to the United States district court, for the district of Hawaii. Filed February 16, 1903. F. D. Monckton, clerk.

49 & 50 *Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

51 At a stated term, to wit, the October term, A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Friday, the fifteenth day of May, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Order of Submission.

Ordered, cause argued by J. E. Foulds, Esquire, counsel for the plaintiff in error, and Benjamin L. McKinley, Esquire, assistant United States attorney, and submitted to the court for consideration and decision.

52 In the United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD & COMPANY, LIMITED (a Corporation), Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

Opinion of U. S. Circuit Court of Appeals.

J. E. Foulds, for plaintiff in error.
Marshall B. Woodworth and Robert W. Breckons, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

An information was filed against H. Hackfeld & Co., Limited, a corporation, charging it with violating the provisions of section 10 of the act of Congress, entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, 26 U. S. Stats. 1084, which provides as follows: "That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner
53 or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid." The information

alleged in substance that the appellant did refuse and neglect to return to the port of Yokohama two Japanese immigrants, Terujiro Yamoto and Hachiero Irie, whom it had brought from that port to the port of San Francisco and who had been denied admission to the United States at the latter port. The case was tried before the court without a jury on an agreed stipulation of the facts. The stipulation of facts contains the following: "That on the 12th day of November, A. D. 1902, the said steamship 'Korea' did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship 'Korea' at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at twelve o'clock, midnight, of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time
54 and five o'clock on the morning of the 13th day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly twenty-five feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship 'Korea;' that said escape did not occur by *vis major*, or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant. That the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan." On this stipulation of facts the plaintiff in error was found guilty of the misdemeanor charged and was adjudged to pay a fine of six hundred dollars. To review that judgment the writ of error is taken.

GILBERT, circuit judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error invokes the rule that a penal law must be strictly construed and contends that within the meaning of section 10 of the act of 1891, there can be no neglect to comply with the obligation thereby imposed if a reasonable attempt be made to perform the same. The case of Warren *vs.* United States, 58 Fed. 559, decided by the circuit court of appeals for the first circuit, is an authority adverse to this contention, but the plaintiff in error earnestly urges that the doctrine of that case involves a mis-
55 conception of the true meaning of the statutes and it cites the case of United States *vs.* Spruth, 71 Fed. 679, in which the district court of the eastern district of Pennsylvania doubted the wisdom of such a construction of language in a criminal statute. In the view which we take of the record which is before us, it becomes unnecessary to enter into a discussion of this question. The

case was tried before the court without a jury upon an agreed stipulation of the facts. In the stipulation appears the fact that the two Japanese who were ordered to be deported, and who had been taken by the plaintiff in error on its steamer from San Francisco to Honolulu en route to Japan, escaped from the vessel while she was lying at anchor at the port of Honolulu, and that they made their escape through portholes from which they dropped or descended into the sea. The record contains no finding of fact by the court further than that the plaintiff in error was found guilty as charged, nor does it state the ground on which the trial judge found the plaintiff in error guilty of the misdemeanor charged. For aught that we know, the court found that by placing the men in the room, as it did, without taking precaution against their escape through the portholes, the plaintiff in error neglected to perform the obligation imposed upon it by the statute. It is true that the stipulation of the facts recites that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or of the plaintiff in error and that the method of the escape could not have been reasonably anticipated. But the court was not bound by these recitals nor was it prevented thereby from placing upon the
56 stipulated facts the construction which in its judgment they should properly bear. (Haight *vs.* Green, 19 Cal. 113.) The assignment of error is that the court erred in rendering judgment upon the pleadings and the facts therein stated. If the trial court entertained the opinion, as may well have been the case, that the plaintiff in error was guilty of negligence in placing the deported persons in a room on board the vessel from which portholes, visible and open, afforded means of escape to anyone who could swim a short distance to the shore, we, in our own view of the facts, could find no ground to question the correctness of that conclusion. The rule is that the burden is on the plaintiff in error to show error in the trial court. In this case we think it has failed to meet the requirement of the rule. The judgment will, therefore, be affirmed.

(Endorsed:) Opinion. Filed Oct. 5, 1903. F. D. Monckton, clerk.

57 United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Judgment.

In error to the district court of the United States for the district of Hawaii.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Hawaii, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed and entered Oct. 5, 1903. F. D. Monckton, clerk.

58 At a stated term, to wit, the October term, A. D. 1903, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Monday, the ninth day of November, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Order Denying Petition for a Rehearing, etc.

Ordered, petition for a rehearing, heretofore filed herein, denied and issuance of mandate stayed to and including Monday, the 16th instant.

59 At a stated term, to wit, the October term, A. D. 1903, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Monday, the sixteenth day of November, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William W. Morrow, circuit judge; Honorable John J. De Haven, district judge.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Order Staying Mandate.

Upon motion of J. E. Foulds, Esquire, of counsel for the plaintiff in error, ordered, issuance of mandate herein stayed sixty (60) days from date.

60 United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Certificate of Clerk Circuit Court of Appeals to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing fifty-nine (59) pages, numbered from one (1) to fifty-nine (59), inclusive, to be a true copy of the entire record of the above entitled case in the said, the United States circuit court of appeals for the ninth circuit, as the same remains of record in my office.

Attest my hand and the seal of the said, the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 7th day of December, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

61 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which H. Hackfeld & Company, Limited, is plaintiff in error and The United States of America is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the district court of the United States for the district of Hawaii, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
62 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of January, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

63 [Endorsed:] 81. File No. 19,178. Supreme Court of the United States. No. 527, October term, 1903. H. Hackfeld & Co., Limited, *vs.* The United States. 81. No. 940. United States circuit court of appeals for the ninth circuit. Writ of certiorari. Filed Jan. 25, 1904 F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

64 Supreme Court of the United States, October Term, 1903.

H. HACKFELD AND COMPANY, LIMITED, Petitioner,
against
THE UNITED STATES OF AMERICA, Respondent. } No. 527.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified transcript of the record on file in the Supreme Court of the United States in the above cause shall constitute the return of the clerk of the circuit court of appeals for the ninth circuit to the writ of certiorari issued herein.

Dated January 18th, 1904.

MAXWELL EVERTS,
Counsel for Petitioner.
H. M. HOYT,
Solicitor-General of the United States.

(Endorsed:) Stipulation of counsel as to return to writ of certiorari. Filed Jan. 25, 1904, F. D. Monckton, clerk.

65 United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a true copy of a stipulation as to return to writ of certiorari filed in the above entitled case on January 25th, 1904, as the original thereof remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of January, A. D., 1904.

F. D. MONCKTON, *Clerk.*

66 United States Circuit Court of Appeals for the Ninth Circuit.

H. HACKFELD & COMPANY, LIMITED, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 940.

Return to Writ of Certiorari.

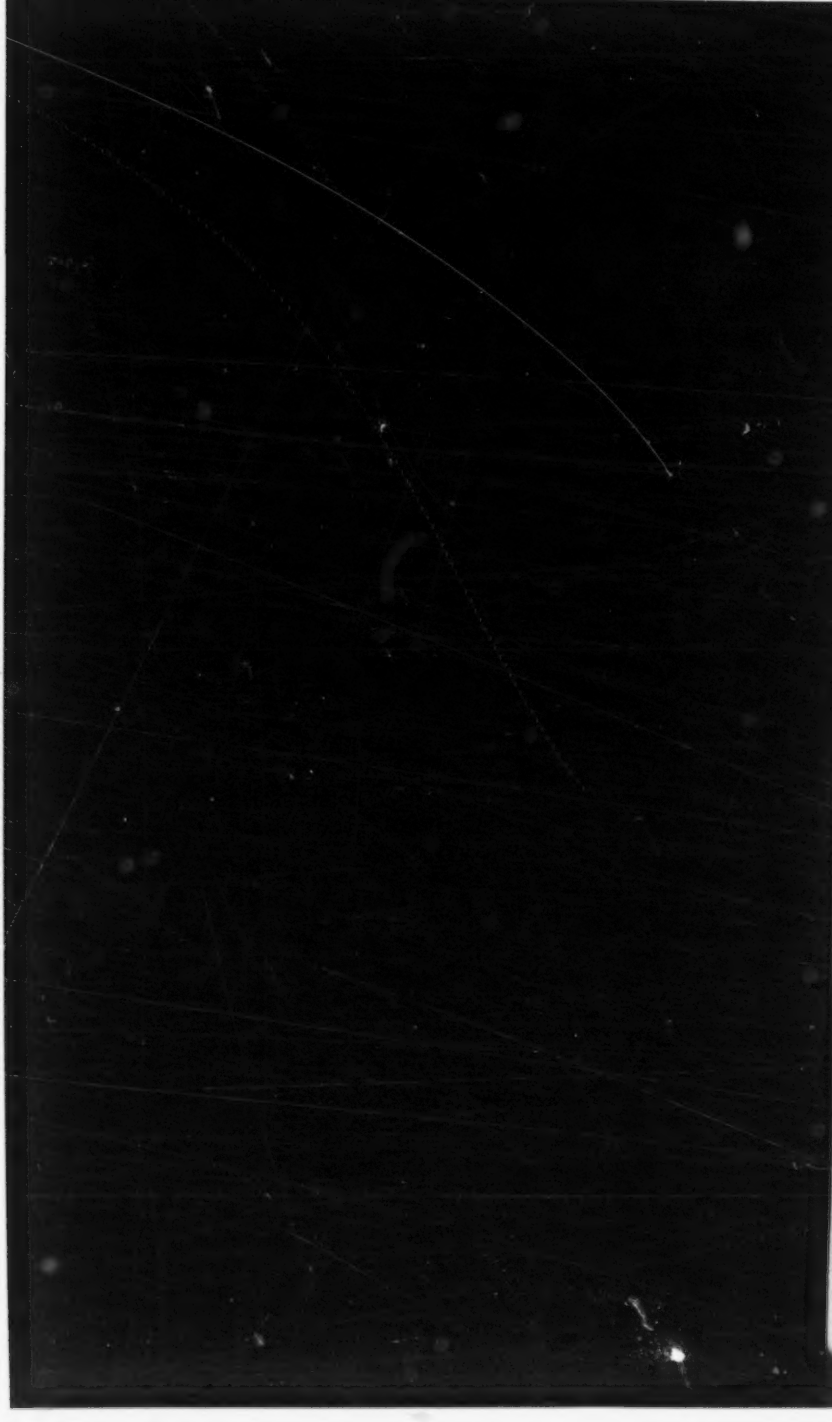
I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the cause wherein H. Hackfeld & Company, Limited, is plaintiff in error, and The United States of America is defendant in error, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 18th day of January, A. D., 1904, the original of which stipulation has been heretofore filed in this court, and do make the same due return to said writ.

Seal United States Circuit Court of Appeals, Ninth Circuit.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States circuit court of appeals for the ninth circuit at San Francisco, California, this 28th day of January, A. D., 1904.

F. D. MONCKTON, *Clerk.*

67 [Endorsed:] File No. 19,178. Supreme Court U. S. October term, 1904. Term No. 164 H. Hackfeld & Co. petitioners *vs.* The United States. Writ of certiorari and return. Filed Feb'y 16", 1904.



IN THE

Supreme Court of the United States,

H. HACKFELD & COMPANY, (LIMITED),
A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court of the United States, for its Review and Determination, the Case of H. Hackfeld & Company (Limited) a Corporation, Plaintiff in Error, vs. the United States of America, Defendant in Error.

To the Honorable the Supreme Court of the United States:

The petition of H. Hackfeld & Company (Limited), a corporation, respectfully shows to this Honorable Court as follows:

This is a proceeding on writ of error (No. 940), in the Circuit Court of Appeals for the Ninth Circuit, taken from a judgment of conviction rendered against your petitioner, plaintiff in error, upon a criminal information filed in the District Court of the Territory of Hawaii, alleging a violation of the provisions of Section 10 of the Act of Congress, entitled "An Act "in amendment of the various acts relative to immigrants and "the importation of aliens under contract or agreement to per-"form labor," approved March 3, 1901. (26 U. S. Stats. at L., p. 1084.) Said section reads as follows:

"Sec. 10. That all aliens who may unlawfully come to "the United States shall, if practicable, be immediately sent "back on the vessel by which they were brought in. The cost "of their maintenance while on land, as well as the expense "of the return of such aliens, shall be borne by the owner or "owners of the vessel on which such aliens came; and, if any "master, agent, consignee, or owner of such vessel shall refuse "to receive back on board the vessel such aliens, or shall "neglect to detain them thereon, or shall refuse or neglect to "return them to the port from which they came, or to pay the "cost of their maintenance while on land, such master, agent, "consignee, or owner shall be deemed guilty of a misdemeanor, "and shall be punished by a fine not less than three hundred "dollars for each and every offense; and any such vessel shall "not have clearance from any port of the United States while "any such fine is unpaid."

The information (pages 3 to 6 of Transcript on Error) contains three counts alleging, respectively, in effect, that plaintiff in error, as agent of the steamship *Korea* plying between the State of California and the Empire of Japan, did, in the District and Territory of Hawaii,

1st. Refuse to receive back on board said vessel;

2nd. Neglect to detain on said vessel; and,

3rd. Refuse and neglect to return to the port from whence they came, two certain Japanese immigrants, then and there unlawfully in the United States, who had, theretofore unlawfully come to the United States in said vessel.

The cause was tried before the Court, without a jury, upon an agreed stipulation as to facts.

(Transcript on Error, pages 25 to 28.)

From this stipulation it appears that the immigrants, who had been denied admission into the United States at San Francisco, were received on board the steamship *Korea* at that port for the purpose of being deported to Japan, for which country said steamship sailed, touching at Honolulu in course of her voyage.

The only facts, upon which the criminal responsibility of plaintiff in error is claimed by the United States to depend, are set forth in paragraph eighth of the stipulation, which reads as follows:

"*Eighth.* That on the 12th day of November, A. D. 1902, " the said steamship *Korea* did arrive at the port of Honolulu, " in the District and Territory of Hawaii; that at the time of " said steamship *Korea* at said port of Honolulu, the said " immigrants were still on board of said vessel; that said " Japanese immigrants, together with certain deported Chi- " nese, were placed in a room on board said vessel and locked " up by the steerage steward of said vessel. At twelve o'clock, " midnight, of said 12th day of November, A. D. 1902, said " Japanese were still on board said vessel in said room; that " between that time and five o'clock in the morning of the 13th " day of November, A. D. 1902, said Japanese had effected " their escape; that the only method of egress was through " portholes, which were nearly twenty-five feet above the water; " that this method of escape could not have been reasonably " anticipated by the master or officers or agents of said steam- " ship *Korea;* that said escape did not occur by *vis major*, or " inevitable accident; and that said escape did not occur by " reason of any negligence or lack of proper care on the part " of the officers of said vessel or said defendant " (plaintiff in error).

The stipulation then adds:

"*Ninth.* That the said defendant (plaintiff in error) " made search for said escaped immigrants, but up to the " present time have not apprehended the said immigrants, and " said immigrants have not been returned to Japan."

The order of the trial court, submitting the cause recites that the attorneys for the respective parties stipulated in writing " as to the facts and *all the* facts herein, and submit the cause " upon said stipulation, said stipulation being ordered by the " Court placed on file, and, *thereupon*, after argument of " respective counsel, the case is, by the Court, taken under " advisement " (Transcript on Error, p. 29).

Notwithstanding these admitted facts, the Court below found (Transcript on Error, pages 30-33) defendant (plaintiff in error) guilty, as charged in the third count of the information, of *refusing and neglecting to return* said immigrants to the port from which they came, and imposed upon it a fine of $600 and costs.

In this case the United States admits that the escape of the two Japanese from the *Korea* occurred through no wilful

refusal, lack of diligence, or want of reasonable care on the part of plaintiff in error, or of the officers of the vessel.

Plaintiff in error claims, that, under the circumstances of this case, there being no wilful refusal, negligence, or want of proper care on its part, it cannot be guilty of a violation of Sec. 10 of the Act, and the judgment of conviction against it should be reversed, and *all* of the facts being agreed upon, the only function of the Court below was to apply the law to the facts—in other words, to construe the statute, and to determine, whether under the agreed facts, plaintiff in error was guilty of a violation of its provisions.

The case was argued by both sides, before the court of appeals, as involving the construction of the statute, alone, but, by its opinion, rendered upon October 5th, 1903, of which copy is appended, as part of the record, that Court declined to consider the construction of the statute, at all, *and affirmed the judgment*, upon grounds stated in its opinion, as follows:

" The record contains no finding of fact by the Court further " than that the plaintiff in error was found *guilty as charged;* " nor does it state the ground on which the Trial Judge found " the plaintiff in error guilty of the misdemeanor charged. " For ought that we know, the Court found that by placing " the men in the room as it did, without taking precaution " against their escape through the portholes, the plaintiff in " error *neglected* to perform the obligation imposed upon it " by the statute. It is true that the stipulation of the facts " recites *that the escape did not occur by reason of any negli-* " *gence or lack of proper care* on the part of the officers of the " vessel or of the plaintiff in error, and that the method of " escape could not have been reasonably anticipated; *but the* " *Court was not bound* by these recitals, nor was it prevented " thereby from placing upon the stipulated facts, the con- " struction which in its judgment they should properly bear. " Haight vs. Green, 19 Cal., 113." (The italics are ours.)

A petition for a rehearing was presented, and denied by the Court of Appeals.

We contend, as hereinafter set forth, that the Court of Appeals erroneously refused to construe the statute in this case, and determine the question of law submitted to it; that the statute cannot properly bear the construction necessarily given to it by the trial Court, and, therefore, that the judgment of conviction should be reversed.

A certified copy of the entire record of said case in said Circuit Court of Appeals is appended hereto as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals.

Petitioner is advised and believes that said judgment of the said United States Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, under and in conformity with the provisions of the Sixth section of the Act of Congress entitled, "An Act to establish Circuit Courts of "Appeals, and to define and regulate, in certain cases, the "jurisdiction of the Courts of the United States, and for other "purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by said Act. Petitioner makes this application for a writ of certiorari upon the following grounds:

1. The question of law involved in said judgment is of sufficient importance to make it the duty of the Supreme Court to take jurisdiction by writ of certiorari, to the end that said judgment of the Circuit Court of Appeals may be reversed.

2. The said judgment of the Circuit Court of Appeals is plainly erroneous.

I.

The Question of Law Involved in Said Judgment is of Sufficient Importance to Make it the Duty of the Supreme Court to take Jurisdiction by Writ of Certiorari, to the End that Said Judgment of the Circuit Court of Appeals may be Reversed.

It is true that, in the cases of Lau Ow Bew, 141 U. S., 583; In re Woods, 143 U. S., 202; Lau Ow Bew, 144 U. S., 47; The Three Friends, 166 U. S., 1, and Forsyth vs. Hammond, 166 U. S., 506, the Court has said, in substance, that the case must be important, to warrant certiorari. Petitioner respectfully submits, however, that the Court has taken jurisdiction, by certiorari in cases of no greater importance than this, namely, in Telfener vs. Russ, 162 U. S., 170; The Conqueror, 166 U. S., 110; Panama R. R. Co. vs. Napier S. S. Co., 166 U. S., 280, and Pullman's Palace Car Co. vs. Central Transportation Company,

171 U. S., 138, which can hardly be said to present any more far-reaching or important question than is the one now presented. Here, the construction of a statute of the United States, imposing heavy penalties upon all carriers of immigrants between foreign countries, and the United States or its Territories violating its provisions, is directly involved, and, under the construction given the act by the trial Court, whose judgment is affirmed by the Circuit Court of Appeals, its effect is, practically, to render the owners, agents and officers of ships carrying such passengers absolutely liable for their escape, and subject, criminally, to punishment therefor, notwithstanding the use of the highest degree of care and skill on their part to prevent such escape. Such an obligation certainly would not be presumed in the absence of the most unequivocal language in the statute, as the burden thereby imposed upon the mercantile marine, not only of this country, but of foreign countries entering our ports, would be so great that few, if any carriers, would voluntarily assume it.

The construction of the statute is a matter of vital importance, not only to the petitioner in this case, but to the officers of the United States whose duty it is to prosecute infractions of the law and to the Courts and juries whose duty it is to try them. The sole decision upon which the Court below must have relied, and, upon which alone, the Government relied, upon the argument before the Court of Appeals, is, as we shall hereafter show, based upon a misconception of the meaning of the statute, and will not, as we believe, meet the approval of this Court.

Under its supposed authority, many prosecutions have been had, and many others are pending, and will, doubtless occur in future, where, under the undisputed facts, no negligence upon the part of the owners, agents or officers of the ship is even claimed to exist. If the construction contended for by us be correct, the officers of the Government who are conscientiously endeavoring to perform their duties, should be relieved from the labor of groundless prosecutions, the time of Courts and juries should not be taken up with the trial of such cases, and the defendants should be discharged from the burden and cost of making defenses therein, and of being compelled to appeal from judgments rendered by the District Courts only by reason of what they deem to be an authority controlling their decisions.

II.

The Said Judgment of the Court of Appeals is Plainly Erroneous.

The sole reason given by the Circuit Court of Appeals for its refusal to consider the construction of the statute, and for its affirmance of the judgment, was, as before stated, that the Court below *was not bound by* the facts, as stipulated, and the court of appeals cites in support of its position the case of Haight vs. Green, 19 Cal., 113.

Upon examining said case, we do not find that it lays down the rule intimated that the court below is permitted to depart *in any degree* from the *ultimate* facts as presented to it by stipulaton. On the contrary, the ultimate facts as admitted by the stipulation in that case (ejectment) were "that the plaintiff's "testator was the owner of the premises prior to defendant's "entry; that defendant entered under him and now claimed "the premises as her property and is in possession." There was added to this stipulation, the words "the defend- "ant does not design in this stipulation to admit a tenancy "at any time." The Court very properly held that the stipulation as to the *ultimate* facts was sufficient to admit title in plaintiff's testator, and that defendant entered under him. It would, thus, have been immaterial whether such entry and possession was by virtue of a tenancy on the part of defendant, or any other entry subordinate to the title of plaintiff's testator, and therefore the addition of the words last quoted from the stipulation did not, in any degree, vary its legal effect; and the court, under the ultimate facts *stipulated*, found *as matter of law* that plaintiff was entitled to recover.

From the earliest period, the Courts of the State of California have, invariably, held, that where all the facts have been stipulated or agreed to, the function of the Court is simply to apply the law to the agreed facts and to enter its judgment thereon.

It would be burdensome and unnecessary to cite all of the cases in which this doctrine is set forth, and we will therefore limit ourselves to the citation of a few which fully support our contention.

In the recent case of McMenomy vs. A. L. White, 115 Cal., 339, the Court says (page 343):

" The objection to certain findings upon the ground that " they were not justified by the evidence, cannot be sustained. " As the case was submitted upon an agreed statement of the " facts, no findings were necessary, the only question being as " to *what was the law applicable to those facts.*"

In the case of Gregory vs. Gregory (102 Cal., page 51), therein cited, the Court says:

" The agreed statement covered *all* the facts of the case and " if findings had been made, they would have been simply a re- " statement of facts already agreed upon and about which " there was no controversy. But it is well settled that findings " are never necessary upon questions about which there is no " dispute. For example, findings are not necessary where the " allegations of the complaint are not denied, or as to facts " admitted by the pleadings * * * And where a finding " made is conclusive against the right of plaintiff to recover, " findings upon other issues are unnecessary to support the " judgment against him."

In the case of Muller vs. Rowell, 110 Cal., 318, the Court says (page 319):

" The statement of facts so agreed to, took the place and " served all the purposes of a formal finding by the Court. " (Brewster vs. Hartley, 37 Cal., 15.) It is only where the " facts are in issue that findings thereon by the Court are " necessary in any case, and where the parties stipulate in " writing as to what the facts are, and file such stipulation in " the action, it is in all substantial respects *the equivalent of* " *admitting them in the pleadings.*"

In the case of Faulkner vs. Rondoni, 104 Cal., 140, the Court says (at page 143):

" It was not necessary to find upon a fact admitted by the " pleadings, but had the Court found against the admission, it " would, *if material, have been ground for reversal.*"

" A fact, contained in the findings of the Court which con- " tradicts the admissions of the pleadings, will not be regarded, " and *no presumption that it was founded upon competent* " *evidence will be indulged.*" Burnett vs. Stearns, 33 Cal., 468.

To the same effect are the following cases, from which we do not make excerpts, as same would only unnecessarily enlarge this petition, viz:

McDonald vs. Mountain View Homestead Assn., 51 Cal., 210.
Traverso vs. Tate, 82 Cal., 170.
Silvey vs. Neary, 59 Cal., 97.
White vs. Douglas, 71 Cal., 115.
Tracy vs. Craig, 55 Cal., 91.
Bradbury vs. Cronise, 46 Cal., 287.
Estate of Doyle, 73 Cal., 564.

We respectfully request the Court to examine the following portions of the record in the present case:

At page 29 of the Transcript on Error, will be found the order of the Court below, submitting the cause, from which it appears that the attorneys for the respective parties stipulated in writing, "as to the fact, and *all the facts* herein, and submit the "cause upon said stipulation, said stipulation being ordered "by the Court placed on file, and, *thereupon* after argument "of respective counsel, the case is, by the Court, taken under "advisement."

The judgment (page 30 of Transcript) recites that the parties have submitted the case "on a stipulation as to the facts."

Negligence is an *ultimate fact*, and not a conclusion of law.

House vs. Meyer, 100 Cal., 592.

The ultimate fact which was in issue before the Court below, in the present case, was as to whether the plaintiff in error had been guilty of negligence in permitting the Japanese to escape, and *this fact was expressly found in its favor* by the agreed statement of facts.

Therefore, we respectfully submit, that if the Court below had made an express finding, in its judgment, instead of an implied finding as suggested in the opinion of the Court of Appeals, that the plaintiff in error *was guilty of negligence* in placing the deported persons in a room on the vessel under the conditions stated, such a finding must, necessarily, under the authorities cited, have been erroneous, because in direct contradiction of the ultimate fact set forth and determined in the agreed statement, upon which alone the case was tried, "that "said escape did not occur by reason of any negligence or lack "of proper care on the part of the officers of the vessel, or of "said defendant." (Transcript, page 28.)

The circumstances under which the Japanese were locked up, and the existence of portholes through which they might have escaped, and the fact that such method of escape could not reasonably have been anticipated by the officers or agents of the ship, are, at most, but probative facts, the *ultimate fact* in issue as we have stated, being as to whether or not the escape occurred through the negligence of the defendant, which, by the agreed statement, was *determined* in its favor.

We may concede that, if the ultimate fact had not been stipulated, the Court might have had the right to make a finding as to such ultimate fact, from such probative facts as had been stipulated to, and submitted, but, in this case, not only the probative facts but the *ultimate* fact of the non-existence of negligence, drawn as a conclusion or inference therefrom, were expressly agreed to, and the Court could not, either expressly, or by implication in support of its judgment, find contrary thereto.

The Court below must, necessarily, therefore, have rendered its judgment upon an application of the statute, *as construed by it*, to the ultimate facts of the case as found. That such construction and application was erroneous was the sole contention made by plaintiff in error, herein, and the correctness of such construction and application was the sole contention of counsel representing the United States in the Court of Appeals.

Section 10 of the Act of 1891, above quoted, for a violation of which this prosecution was had, is of a highly penal character. A violation of its requirements is not the subject of a civil action for a penalty, but is declared to be a misdemeanor, and punished by a fine of not less than $300. It cannot, therefore, be extended, by implication or construction, to cases not fairly within its terms.

In the language of Chief Justice Marshall, in U. S. vs. Wiltberger, 5 Wheaton, 95, "The rule that penal laws are to be "construed strictly, is, perhaps, not much less old than con- "struction itself. It is founded on the tenderness of the law "for the rights of individuals; and on the plain principle that "the power of punishment is vested in the legislative, not in "the judicial department. It is the Legislature, not the Court, "which is *to define a crime and ordain its punishment*. (The "italics are ours.) It is said, that, notwithstanding this rule, "the intention of the law-maker must govern in the construc- "tion of penal, as well as other statutes. This is true. But this

" is not a new, independent rule, which subverts the old. It is a " modification of the ancient maxim, and amounts to this: that, " though penal laws are to be construed strictly, they are not " to be construed so strictly as to defeat the obvious intention " of the Legislature. The maxim is not to be so applied as to " narrow the words of the statute to the exclusion of cases " which those words, in their ordinary acceptation, or in that " sense in which the Legislature has obviously used them, " would comprehend. The intention of the Legislature is to " be collected from the words they employ. Where there is " no ambiguity in the words, there is no room for construction. " The case must be a strong one indeed, which would justify a " Court in departing from the plain meaning of words, espe- " cially in a penal act, in search of an intention which the words " themselves did not suggest. To determine that a case is " within the intention of a statute, its language must authorize " us to say so. It would be dangerous, indeed, to carry the " principle that a case which is within the reason or mischief " of a statute, is within its provisions, so far as to punish a " crime not enumerated in the statute, because it is of equal " atrocity, or of kindred character with those which are enum- " erated."

We have made the foregoing excerpt at some length for the reason that, ever since the day when the opinion of the great expounder, from which it was taken, was rendered, it has stood as the rule governing the construction of penal statutes in this country, and, we conceive, that only disregard of its principles could have induced the rendition of the judgment in this case.

Section 10 of the Act defines as a misdemeanor, and punishes by fine, three specific acts, all of which are alleged in the information, viz:

1. A refusal to receive immigrants back upon the vessel.

2. A neglect to detain them on the vessel.

3. A refusal or neglect to return them to the port from whence they came.

There is nothing technical in the language of the Act.

There can be no refusal, without the existence of an intention to decline or repudiate the duty or obligation whose performance is demanded, and there can be no neglect to perform such duty or obligation if a reasonable attempt has been made to perform the same.

The words used have a plain, ordinary meaning, and, as above quoted from Judge Marshall, "where there is no ambiguity in the words, there is no room for construction."

The stipulation as to facts admits that the immigrants were locked up in a room on the vessel by its officers, and between twelve o'clock midnight and five in the morning effected their escape by a method which could not have been reasonably anticipated by the master, officers, or agents of the steamship; that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel, or of plaintiff in error, and that the latter has made search for the escaped immigrants, but up to the present time has not apprehended them. (Transcript on Error, pages 27 and 28.) Yet, notwithstanding these facts, the Court below found that plaintiff in error did "*refuse* and *neglect* to return (the immigrants) to the port from which they came." (Transcript, page 30.) In making a finding so utterly at variance with the facts, it is apparent that the Court below was misled by the construction placed upon the word "neglect" as used in the statute under consideration, in the case of Warren vs. United States, 58 Fed. Rep., 559, a construction which, as we contend, is entirely unwarranted and indefensible.

A strong circumstance indicating that such was the case is that in the stipulation as to facts, is contained a statement that, "said escape did not occur by *vis major* or inevitable accident." (Transcript, page 28.) In view of the other admitted facts as to the absence of negligence on the part of the defendant, which render such language unnecessary, it is significant that the words last above quoted are taken directly from the opinion in the Warren case, by which it is, in effect, declared, that the master officers and agents of the vessel are, in law, *insurers* of the return of immigrants of the class under consideration, except when prevented by "*vis major* or inevitable accident," and by no other excuse can relieve themselves from criminal liability.

The Warren case is the only one that can be found that attempts to put such a construction upon the Act, and is the only support that can be claimed, or was claimed by the United States in the argument before the Court of Appeals, for the judgment in this case.

In the Warren case it was admitted that the immigrants, who should have been detained on the vessel and returned, did, in fact, escape therefrom, and evidence was offered on the part of the defendant, to prove that there was no negligence or neglect in detaining them, and that they escaped without any negligence or neglect upon the part of the defendant. This evidence was excluded, and the action of the Court therein assigned as error.

The Court further ruled that the defendant was bound, at all hazards, to detain the aliens on board the vessel, and that nothing would relieve him of his obligation to do so, except *vis major* or inevitable accident.

In its decision, the Court of Appeals of the First Circuit goes into much elaborate consideration of other provisions of the Act to show that it was the intention of Congress that no such objectionable aliens should enter the country—a proposition which no one questions, as it is the whole object and purpose of the Act—and then, because of such discovery of the intention of Congress, proceeds to apply to the word "neglect" a meaning which it never had, either technically or colloquially. At the close of the opinion the Court says, "but we have no "doubt that, in view of the *general purposes of the statute* "the word 'neglect' must here receive a common and popular "signification, as the equivalent of 'fail' or 'omit.' The em- "ployment of the term 'neglect' in this sense is neither infre- "quent nor unfamiliar, and assigning to it here any more "restricted or narrow definition *would defeat the whole end* "*of the statute*—a result to be tolerated only when necessary."

With all deference to that Court, we have yet to learn that the common or popular signification of "neglect" is the equivalent of "fail" or "omit." On the contrary, there is not a wayfaring man in the country who would for a moment fail to note the complete distinction in meaning between a charge against him of "neglect" and one of mere omission without any fault on his part.

The fear of the Court that if such an enlarged and unusual definition of "neglect" should be denied, "it would defeat the whole end of the statute," is entirely without foundation. As matter of fact, scarcely a steamer leaves this, or any other great seaport of the United States without more or less deported immigrants thereon, yet, is it not matter of common knowledge that the vast majority of them, under the watchful eyes of the

officers of the vessels transporting them, arrive, in due course, safely at their destination. It is only in an exceptional case that some one or more, having greater cunning or desperation than ordinary, succeed in circumventing their guards, and in escaping from custody.

Nor is the reasoning of the Court immediately preceding this extraordinary definition of "neglect" and leading up to it, and the supposed analogies cited, less free from infirmity.

The Court says: "The statute is analogous to acts regarding "the sale of unwholesome or diseased provisions, or the keep- "ing and storage of dangerous explosives, or the sale of intoxi- "cating spirits. The safety and protection of the public is the "end sought. Upon every one rests the duty to see to it that "no act or omission of his shall endanger that safety, and, if "he fails of the full performance of that duty, good intention, "or the absence of evil intention, will not excuse him. The "responsibility may be regarded similar to that resting upon a "sheriff in case of an escape. He cannot excuse himself by "showing that he had exercised care to keep his prisoner."

It is certainly somewhat strange to hear a learned Court calmly place human beings in the category of substances, in themselves so dangerous or noxious as to place an increased burden of *insurance* of the safety of the persons and property of his neighbors upon the person in whose custody they may be. Certainly the statute does not attempt to do so—on the contrary, the statute contemplates that each of these persons is entitled to a temporary removal to shore, if necessary, and to an examination by the proper officers for the purpose of determining whether he is or is not entitled to enter the United States, and it is only after such examination, and a determination adverse to his right, that the vessel which brought him is required to take him back. But such an executive determination does not degrade him to the condition of a noxious substance, or a wild animal, nor does it impose upon the carrier the liability of a common carrier of goods and chattels, *i. e.*, an insurer against everything except the act of God and the act of the public enemy. Yet that is the condition to which this decision apparently reduces him, with the added pains and penalties attached to a conviction for misdemeanor, with a fine of not less than $300. The analogy between the liability of the defendant and that of a sheriff for an escape made by the Court

is particularly unfortunate, as ever since the days of Sir William Blackstone, at least, an officer has only been liable for a *negligent* escape.

4 Bl. Com., 130.
Sections 316 and 321, Bishop on Criminal Law. (7th Ed.)

Under the facts, as stipulated in the present case, it appears (Transcript, page 27) that the aliens escaped from the ship through portholes, which were nearly twenty-five feet above the water. Whether they succeeded in reaching shore or not, does not appear, but, under the rule laid down in the Warren case, if they had jumped from these portholes or from the deck of the vessel in mid-ocean, and had indubitably perished, the plaintiff in error here would have been guilty of a misdemeanor, notwithstanding that it might have taken every precaution which human skill or care could suggest to prevent the occurrence of such a casualty.

The statement of the proposition would almost seem to be its own refutation.

It is certainly inconceivable to us how a "refusal" could take place without volition, or "neglect" occur without negligence.

So far as we are aware, the Warren case has only once been judicially cited, and that with disapproval.

In United States vs. Spruth, 71 Fed. Rep., 679, the District Court of the Eastern District of Pennsylvania granted a new trial in a prosecution under Section 8 of the Act of 1891, in which a conviction had been had under the supposed authority of the Warren case, and, in his opinion granting a new trial, the learned District Judge says, "To justify a conviction it " seems so clearly necessary to prove willful or negligent " permission to escape that I expressed surprise at what was " supposed to be decided in Warren vs. United States, but " ordered a conviction in deference to that case. Upon further " examination it is found that Warren vs. United States arose " under the tenth section of the statute, in which the language " used is different, and, although the eighth section is cited and " apparently treated as if it should receive a similar construc- " tion, the *decision* is not applicable to the case in hand. It is " not improbable that it will be followed with reluctance, even " as respects the tenth section. The wisdom of such a construc- " tion of language in a criminal statute may be doubted."

Although the District Court felt itself, against its better judgment, bound to follow the Warren case, being the decision of a Circuit Court of Appeals, as *stare decisis*, while the case before it was believed to be precisely similar to that passed on therein, yet it lost no opportunity to disregard it when it was sought to apply it by analogy to another section of the same Act in which similar language was used, and expressed itself, in no uncertain language, in condemnation of the doctrine there announced.

But whatever may be the binding effect of a decision of a United States Court of Appeals upon inferior courts, it is, in no sense, controlling upon other and co-ordinate Courts of Appeals.

> Mast Foos & Co. vs. Storer Mf'g Co., 177 U. S. Reps., p. 485.

The views contended for by us herein have been fully sustained by the opinion of the Attorney General of the United States. In 23 Op. Attys. Gen., p. 271, Mr. Attorney General John W. Griggs, on Oct. 5th, 1900, dealing with a case in which a deposit of $900 had been made with the Collector of Customs, under protest, on behalf of a French steamship, from which three alien immigrants had escaped without fault of the master or agents of the vessel, while holding that the provisions of the Revised Statutes relating to the remission of fines, penalties and forfeitures, did not include offenses against the alien immigration act, used the following language in his opinion to the Treasury Department, to whom an application had been made for the return of the deposit: "But while I "assume nothing relative to the facts in this case, with which "it is your duty to deal, and not mine, I am clearly of the "opinion that in a case where every precaution to detain in "safe custody and prevent escape has been rigidly taken, and "yet in some real and unforseen emergency an escape has "occurred, there is no such neglect as the act contemplates."

"If the question were regarded otherwise, the Act would "rather have said: 'If any such alien *shall escape* from such "'vessel, such master shall be deemed guilty of a misdemeanor, "'and shall be punished,' etc. In a case not merely doubtful, "but really meritorious, the fine would not have been incurred, "and the law would not impose it. * * * The law does

" not compel you, against your possible knowledge that there " was no failure whatever in good faith, or proper measures " to guard and prevent escape on the part of the master, " nevertheless to collect from him the amount of a fine which " is surely imposed only upon the guilty however their guilt " may be determined."

We, therefore, respectfully submit that such a construction as was put upon the plain and unambiguous language of Section 10 of the Act by the Warren case, and followed by the lower Court in the case at bar, cannot be justified. It is repugnant to reason and common sense, and we respectfully submit that the judgment is contrary to the law, and to the admitted facts in the case, and should, therefore, be reversed.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, " H. Hackfeld & Company (Limited), a corporation, Plaintiff " in Error vs. The United States of America, Defendant in " Error," No. 940, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An Act to establish Circuit Courts " of Appeals and to define and regulate in certain cases the " jurisdiction of Courts of the United States, and for other " purposes," approved March 3, 1891, and that petitioner may have such other or further relief or remedy in the premises as to the Court may seem appropriate and in confirmity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

HACKFELD & COMPANY (Limited), a corporation.

By Maxwell Evarts

Its Attorney.

State of New York }
County of New York } ss

Maxwell Evarts, being first duly sworn, on oath says: I am the attorney for the above-named petitioner, and have read the foregoing petition and know the contents thereof. The said petition is true of my own knowledge except as to the matters which are therein stated on information and belief. As to those matters, I believe it to be true. I further state that the reason why I make this verification and why the same is not made by said petitioner is that said petitioner is a corporation resident of the Territory of Hawaii; that all of its officers reside in said Territory, and that the stay of mandate granted by the Circuit Court of Appeals for the purpose of permitting this application to be made will lapse before this petition can be forwarded to Hawaii for signature by the officers of said corporation, and filed in the Supreme Court of the United States.

Subscribed and sworn to before me this 18th day of December, A. D. 1903. Maxwell Evarts.

Charles Franklin
Notary Public in and for the
County of New York

(Seal)

FILE COPY.

JAN 25 1905

JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 184.

H. HACKFELD & CO., LIMITED,
Petitioner,

against

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

MAXWELL EVARTS,
Of Counsel for the Petitioner.

C. G. Burgoyne, Walker and Centre Streets, New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 164.

H. HACKFELD & Co., Limited,
Petitioner,

AGAINST

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

Statement.

On October 28, 1902, the steamship "Korea," belonging to the Pacific Mail Steamship Company, brought two Japanese persons from Yokohama, into the port of San Francisco, California. They were denied admission into the United States and were ordered deported, and on November 7, 1902, they were placed on board the "Korea" for the purpose of deportation to Japan.

On November 12, 1902, the "Korea" on her way to Japan, stopped at the port of Honolulu in the district and territory of Hawaii. When the "Korea" arrived at Honolulu, the two Japanese were still on board the vessel, and were placed with certain Chinese (also ordered to be deported) in a room on the vessel, and locked up by the steerage steward. At about 12 o'clock, midnight, the Japanese were still locked in the room of said vessel. Between that time and 5 o'clock in the morning of November 13, 1902, the Japanese effected their escape through portholes in the room which were nearly 25 feet above the water (Record, p. 15). Apparently none of the Chinese locked in the room with the Japanese escaped.

An information was filed by the United States Attorney for the District of Hawaii against H. Hackfeld & Co., Limited, the agent of the steamship "Korea," upon the ground that said Hackfeld & Co., Limited, neglected to detain and refused and neglected to return to the port of Yokohama, in the Empire of Japan, the two Japanese immigrants, in violation of Section 10 of the Act of Congress, entitled "An Act in amendment of the various acts relative to immi-

grants and the importation of aliens under contract or agreement to perform labor," approved March 3, 1901 (Record, p. 2).

To this information the defendant H. Hackfeld & Co., Limited, pleaded not guilty (Record, p. 12). A stipulation waiving a jury was signed by the attorney for the United States and the attorneys for the defendant, and the case was tried by the Court upon an agreed stipulation of facts, by which it was stipulated that the method of escape of the two Japanese immigrants "could not have been reasonably anticipated by the master or officers or agents of said steamship 'Korea' * * * and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant" (Record, p. 15).

The case was tried and the defendant was found by the Court to have refused and neglected to return to the port from whence they came the two Japanese immigrants, and to be guilty as charged in the information, and a fine was imposed of six hundred dollars (Record, p. 17).

The judgment imposing the fine was brought by writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, which

affirmed the judgment below upon the theory that the trial court was not bound by the stipulation between the parties that the "escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant," and that it was at liberty to find that the defendant by placing the men in the room as it did, without taking precaution against their escape through the portholes, neglected to perform the obligation imposed upon it by the statutes, and that, if such was the view of the trial court, the Circuit Court of Appeals could find no ground to question the correctness of such conclusion (Record, p. 27).

The case was then brought to this Court by writ of *certiorari*, and the only questions presented by the record would seem to be these:

(1) Is a court which tries a case upon a stipulation of facts agreed upon in writing by the parties, bound to find the ultimate facts in the case as they have been stipulated?

(2) Can a defendant be convicted under the Act of Congress in question, if the escape of the returned immigrant was not due to negligence on his part?

FIRST POINT.

The trial court was bound by the stipulation of the parties.

In the stipulation which was signed by the attorney for the Government, by the defendant's attorneys, and by the defendant itself, it is expressly stipulated that the escape of the two Japanese "did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant." This was a stipulation as to the ultimate fact in the case. The whole question before the Court was, whether the defendant could be convicted under the Immigration Act, when the escape of the deported foreigners took place without any negligence on its part. The parties agreed that there was no negligence in the particular proceeding before the Court, and asked the Court to determine whether, as a matter of law, in such a case, where there was no negligence, the defendant could be convicted.

The view which the Court below took of the action of the trial court was that the latter was entitled to and did find that the defendant was negligent, notwithstanding the stipulation between the parties that it was not negligent, and

that, therefore, the judgment of the trial court should be sustained without requiring any discussion of the doctrine in the case of Warren vs. United States, 58 Fed. Rep., 559, which case, the appellant has always claimed, placed a construction upon the act which should not be followed. That is to say, the Court below avoided the discussion of the application of the Warren case to this controversy upon the ground that the facts were such that it had no bearing thereon.

The mere statement of the proposition that a Court cannot find an ultimate fact in the case contrary to the stipulation of the parties as to what such ultimate fact is, would seem enough. Where a jury is waived, and the case is tried upon a stipulation of facts agreed upon by the parties, it would seem that the ultimate facts so agreed on must necessarily be taken by the Court as the true facts of the case, without regard to what conclusion the Court might think it would itself have come to from the evidential facts, or else that the stipulation must be entirely disregarded and the case tried in the usual way by oral testimony. The Court must either try the case on the stipulation agreed upon or not at all. It cannot frame a stipulation for itself.

The stipulation of facts in this case contained the ultimate fact that the defendant was not negligent in regard to the escape of the Japanese. It thus met the requirements of this Court, which has held that a statement of facts by the parties must state the ultimate facts of the case. This was held in Raimond vs. Terrebonne Parish, 132 U. S., 192, 194, where it was said:

> "By the settled construction of the acts of Congress defining the appellate jurisdiction of this Court, either a statement of facts by the parties or a finding of facts by the Circuit Court is strictly analagous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred."

In Wilson vs. Merchants Loan and Trust Company, 183 U. S., 121, 128, it was said:

> "Although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts together with certain other facts evidential in their nature from which an

> important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute."

If the trial court is not bound by the stipulation of facts as submitted by the parties it would seem as if the field open to a Court trying a case in which a jury has been waived and the facts stipulated is even greater than that of a jury. The stipulation is the evidence in the case. If a Court can find the facts contrary to the express stipulation, then it is equivalent to the Court finding the facts contrary to the evidence or without any evidence.

There can be no dispute as to what the stipulation was upon the question of the negligence of the defendant. It is stated in so many words that the escape of the Japanese did not occur by reason of any negligence or lack of proper care on the part of the defendant. That is the ultimate fact to be gathered from the other evidential facts in the case. If the stipulation had not contained this ultimate fact, but had stopped short thereof, giving only the evidential facts,

of course it would have been open to the Court to find such ultimate facts from the stipulation as it chose, either that the defendant had been or had not been guilty of negligence, and the defendant would of course have been bound by such finding. But the ultimate fact of an absence of negligence having been stipulated by the parties, that would seem to be an end of the matter and to leave the Court without power to make any finding to the contrary.

The relation of the trial court to a stipulation of facts is not unlike the attitude of an appellate court in reference to the findings of the Court below. If the lower court finds the ultimate facts in the case, then the appellate court is necessarily bound by such finding and cannot overcome it, by claiming that the evidential facts show such finding to be wrong.

The case of Dooley vs. Pease, 88 Fed. Rep., 446 (affirmed in 180 U. S., 126), was an action of trespass brought by the plaintiff as Receiver of a National Bank against the defendant the Sheriff of Cook County, Illinois, charging him with having forcibly seized and carried away a stock of goods. The question in dispute in the case was as to the ownership of the goods at the

time of the seizure. The goods had formerly belonged to the attachment defendant, prior to and on April 25, 1895, and the question was whether the instrument of sale that day executed in the name of the attachment defendant by its president was valid and effective to transfer title to the plaintiff as Receiver. The validity of the instrument was denied upon the ground that the president of the company was without authority to make the sale. It was insisted that the facts contained in the special finding of the Judge which were evidential only of the ultimate facts found required a contrary conclusion. The Circuit Court of Appeals for the Seventh Circuit declined to pass upon the question of whether the finding of the Court was according to the preponderance of evidence, and pointed out that it was bound by the findings of the lower court on any ultimate fact, without regard to whether it thought such findings could be sustained by the evidential facts. The Court said at page 448 as follows:

> "But, if a party sees fit to waive a jury in a case involving a question of that kind [mixed question of law and fact], he puts it beyond his power to challenge the Court's

finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. *For instance if the issue be negligence, which rarely is resolved into a pure question of law, a special finding of the ultimate fact either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong;* and so, here, the finding that the sale was unauthorized, and had not been ratified, cannot be impeached on the strength of the circumstances stated tending to show the contrary. The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment."

In Supervisors vs. Kennicott, 103 U. S., 554, a jury was waived and the case tried upon an agreed statement of facts. This Court in speaking of the duty of the Court below, said at page 556:

"This record shows distinctly that the court was only *required to determine whether in law, on the agreed facts*, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the

> plaintiffs, but that, when read in connection with the bill of exceptions, is no more than a declaration that the court found *the law to be in favor of the plaintiff on the case as stated.*"

The Kennicott case would seem to be a square authority to the effect that the trial court in this case could only determine whether, under the Immigration Act, the defendant could be convicted for neglecting to detain the Japanese immigrants on board the "Korea" when it had been guilty of no negligence with reference to their escape. That is to say, the Court below was obliged to take the facts as they had been agreed on, especially the ultimate fact of negligence, and simply find what the law was as applicable to such facts, and that it was not open to the Court to find from the evidential facts the ultimate fact that the defendant was negligent, notwithstanding the stipulation that it was not. In other words, the sole question properly before the trial court under the stipulation of facts was whether a defendant can be convicted under Section 10 of the Immigration Act for an escape of deported foreigners which occurred without negligence or want of care on its part,

and such question was all that the Court below was required to or could determine.

SECOND POINT.

The conviction of the appellant for neglecting to detain on board the "Korea" at Honolulu the two Japanese cannot be sustained in the absence of any negligence on its part.

The section of the Immigration Act, which is to be construed, is of a highly penal character, and is as follows:

> Sec. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, *or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came*, or to pay the cost of their

> maintenance while on land, such master, agent, consignee or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid [26 U. S. Stat., 1084, 1086].

It was long ago established as the law that penal statutes should be construed strictly. It is unnecessary to cite authority in support of this proposition, but in U. S. vs. Wiltberger, 5 Wheat., 95, it was said by Chief Justice MARSHALL:

> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

The offense charged in this case was the neglecting to detain the Japanese on the vessel, and neglecting to return them to the country from

whence they came. The whole controversy seems to come to this one question: What is meant by the word "neglect" as used in the statute? Can a man neglect to do a thing without being careless and negligent?

It is conceded that Hackfeld & Co. were not guilty of any negligence in the fact that they did not detain the Japanese in the ship and did not return them to Japan. It is so stipulated. If they were not guilty of negligence in such regard, it is not plain how they can be said to have neglected to do so.

The verb "neglect" certainly carries with it the idea of negligence. If a man neglects to do a particular thing, he does not take the necessary care to see that the particular thing is done. He is careless and negligent. If Congress had intended that the carrier was to be regarded as an insurer of the return of an immigrant ordered deported it would hardly have chosen the word "neglect," and would have used some word such as "fail" or "omit" in place thereof. The words "neglect," "fail" and "omit" are by no means synonymous. The word "neglect" means to fail to do a thing by reason of want of care and negligence. If a man is to be punished for failing or omitting

to do some act, it is enough to show that he has not done it; but if he is to be punished for neglecting to do it, there must be shown in addition to the fact that he failed or omitted to do it, that such failure or omission was the result of negligence and want of care on his part. That is to say, the word "neglect" means something more than the words "omit" or "fail," and contains the further element of negligence and want of care as the reason of the failure and omission. The definition of the verb "neglect" in the Standard Dictionary of 1904 is "to fail to perform through carelessness."

Therefore a strict construction of this highly penal statute would seem to require that, before a person could be convicted thereunder for not detaining on a ship immigrants ordered to be deported, and for not returning them to the country from whence they came, the immigrants must be shown not only not to have been detained and not to have been returned, but that such failure and omission to detain and return them was the result of negligence and want of care on the part of the defendant.

So far as known the only case construing the 10th Section of the Immigration Act is Warren

vs. United States, 58 Fed. Rep., 559. This case was decided adversely to the contention of the petitioner in the case at bar. The question in the Warren case was whether the ruling of the trial court which excluded evidence tending to show that the escape of the immigrants was not due to the negligence of the defendant, was right. It was held by the Circuit Court of Appeals for the First Circuit that the ruling was right, apparently on the theory that the carrier was obliged to return either dead or alive immigrants ordered deported and the Court classed such immigrants with "unwholesome or diseased provisions" and with "dangerous explosives."

Inanimate objects and human beings can hardly be classed together. A person might properly be held as an insurer in one case and not in the other. The carrier is obliged to have some regard for the fact that the immigrants ordered returned are human beings, and must treat them accordingly. He cannot box them up in crates or put them in chains in the lower hold of the vessel. It was never the intention of Congress that they should be so treated, nor did it ever occur to anybody that a Court would so construe the statute as to practically compel the carrier

to take some such course. It would seem as if, in the Warren case, it was the Court in Massachusetts, which compared human beings with "diseased provisions" and "dangerous explosives," and not the carrier which was without soul.

In other words the carrier is obliged to treat deported immigrants in a proper way, having regard to the fact that they are still human beings, even if not permitted to live in this country, and if every reasonable precaution and care is taken to prevent their escape, then it is difficult to see how the carrier can be held criminally liable when such escape is not due to its negligence and want of care.

The Japanese, who escaped, did something which the other immigrants deported with them did not dare to do and which had never been done before and which nobody would naturally anticipate. The escape did not occur through any negligence on the part of the defendant (Record, p. 15).

Now, either the carrier must crate deported immigrants or chain them and deliver them in the country from whence they came either dead or alive, or it must be held responsible

for escapes only when occurring through negligence and want of care on its part, the question of negligence to be determined with due consideration for the fact that human beings are entrusted to its custody.

Under the ruling of the Warren case the carrier would have been held liable if the Japanese had jumped overboard in midocean and drowned because the carrier failed and omitted to detain them on the vessel and return them to the country from which they came. Such construction of the statute would hardly seem reasonable in such a case, but there is absolutely no difference in principle between the case suggested and the present case.

The Warren case was strongly criticised in United States vs. Spruth, 71 Fed. Rep., 678, where Judge BUTLER declined to follow it as to another portion of the Immigration Act, and then said, at page 680, as to the 10th Section of the act:

> "It is not improbable that it will be followed with reluctance, even as respects the tenth section. The wisdom of such a construction of language in a criminal statute may be doubted."

It is, therefore, respectfully submitted that a conviction for neglecting to detain on board a vessel deported immigrants cannot be sustained when the escape of the immigrants was not due to any negligence on the part of the defendant.

MAXWELL EVARTS,
Of Counsel for the Petitioner.

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Office Supreme Court U. S.
FILED
JAN 4 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

H. HACKFELD & CO., LIMITED,
v.
THE UNITED STATES.
} No. 527. 1904.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN OPPOSITION TO THE PETITION.

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BRIEF IN OPPOSITION TO THE PETITION.

The Government opposes the granting of a writ of certiorari in this case, for the reason that the only question of sufficient importance to justify its issuance—whether or not section 10 of the act of March 3, 1891, makes the master, agent, consignee, or owner of a vessel a guarantor of the safe custody of an alien unlawfully brought into the United States—was not considered by the circuit court of appeals, whose judgment is sought to be reviewed, nor, so far as the record shows, did it enter into the judgment of the district court.

In affirming that judgment, the circuit court of appeals, after stating the case, said (Transcript of Record, pp. 52–56):

> The plaintiff in error invokes the rule that a penal law must be strictly construed, and contends that within the meaning of section

10 of the act of 1891 there can be no neglect to comply with the obligation thereby imposed if a reasonable attempt be made to perform the same. The case of *Warren* v. *United States* (58 Fed., 559), decided by the circuit court of appeals for the first circuit, is an authority adverse to this contention; but the plaintiff in error earnestly urges that the doctrine of that case involves a misconception of the true meaning of the statute, and it cites the case of *United States* v. *Spruth* (71 Fed., 679), in which the district court of the eastern district of Pennsylvania doubted the wisdom of such a construction of language in a criminal statute. In the view which we take of the record which is before us, it becomes unnecessary to enter into a discussion of this question. The case was tried before the court without a jury upon an agreed stipulation of facts. In the stipulation appears the fact that the two Japanese who were ordered to be deported, and who had been taken by the plaintiff in error on its steamer from San Francisco to Honolulu en route to Japan, escaped from the vessel while she was lying at anchor at the port of Honolulu, and that they made their escape through portholes from which they dropped or descended into the sea. The record contains no finding of fact by the court further than that the plaintiff in error was found guilty as charged, nor does it state the ground on which the trial judge found the plaintiff in error guilty of the misdemeanor charged. For aught that we know,

the court found that by placing the men in the room, as it did, without taking precaution against their escape through the port-holes, the plaintiff in error neglected to perform the obligation imposed upon it by the statute. It is true that the stipulation of the facts recites that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or of the plaintiff in error, and that the method of the escape could not have been reasonably anticipated. But the court was not bound by these recitals, nor was it prevented thereby from placing upon the stipulated facts the construction which in its judgment they should properly bear. (*Haight* v. *Green*, 19 Cal., 113.) The assignment of error is that the court erred in rendering judgment upon the pleadings and the facts therein stated. If the trial court entertained the opinion, as may well have been the case, that the plaintiff in error was guilty of negligence in placing the deported persons in a room on board the vessel from which port-holes, visible and open, afforded means of escape to anyone who could swim a short distance to the shore, we, in our own view of the facts, could find no ground to question the correctness of that conclusion. The rule is that the burden is on the plaintiff in error to show error in the trial court. In this case we think it has failed to meet the requirements of the rule. The judgment will, therefore, be affirmed.

The question as to the proper construction of section 10 of the act of March 3, 1891, is undoubtedly a matter of public importance, and the Government itself is interested in having it finally settled. But not having been considered by either of the courts below, that question is not, we think, so presented by this record as to call for its determination in the extraordinary manner now invoked. This would be so even if the view of the circuit court of appeals as to the effect to be given the recital in the stipulation of facts of absence of negligence were erroneous, which I do not concede, but deem it unnecessary to discuss. The very importance of the question seems to require that, if possible, the court be aided in its adjudication by some expression of opinion on the part of the court whose judgment it would be called upon to review.

I may add, in further explanation of the position of the Government, that I am informed by the United States attorney for the northern district of California that there is now pending in the circuit court of appeals for the ninth circuit a case in which the main question sought to be here raised is squarely presented.

For the reasons stated, it is submitted, the petition should be denied.

HENRY M. HOYT,
Solicitor-General.

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JAMES H. McKENNEY,
Clerk.

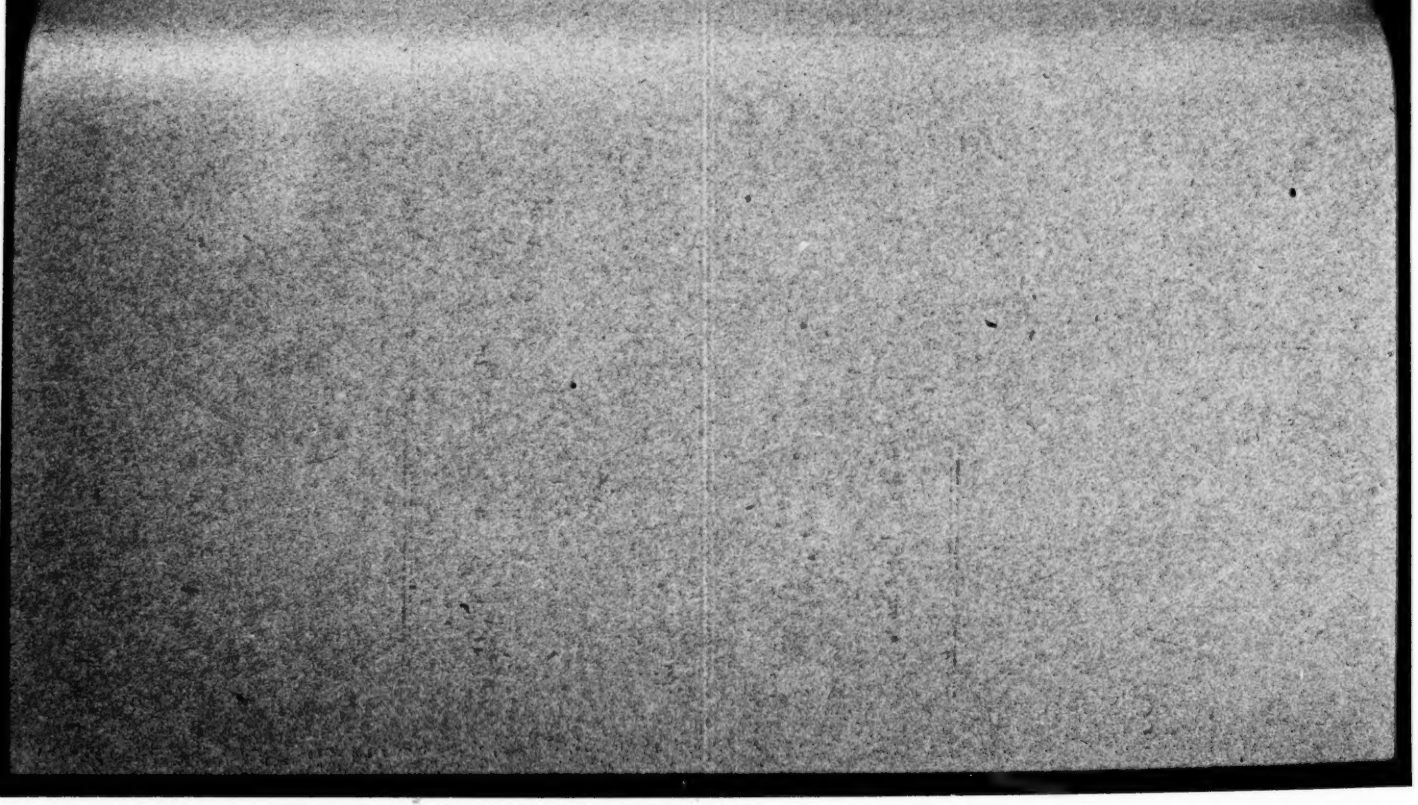
In the Supreme Court of the United States.

OCTOBER TERM, 1904.

H. HACKFELD & CO., LIMITED, PETITIONER,
v.
THE UNITED STATES.
No. 164.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1904.

H. HACKFELD & CO., LIMITED, PETITIONER,
v.
THE UNITED STATES.
No. 164.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a writ of certiorari to the circuit court of appeals for the ninth circuit to review the decision of that court affirming a judgment of conviction in the district court of the United States for the district of Hawaii against petitioner, H. Hackfeld & Co., Limited, upon an information filed in that court alleging a violation of the provisions of section 10 of the act of Congress of March 3, 1891, entitled "An act in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." (26 Stat., 1084.)

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Said section reads as follows:

> SEC. 10. That all aliens who may unlawfully come into the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid.

The United States attorney for the district and Territory of Hawaii entered into a stipulation as to the facts with H. Hackfeld & Co., Limited, as follows (Rec., p. 14):

> The United States of America, the plaintiff in the above-entitled action, through and by Robert W. Breckons, attorney of the United States in and for the district and Territory of Hawaii, and H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, through and by its counsel, Messrs. Kinney,

Ballou, and McClanahan, do hereby agree and stipulate that on the trial of this cause the following shall be taken as the facts, and all the facts, in said cause, and that the jury herein, under the instructions of the court, or the court herein, should the trial by jury be waived, shall determine the cause upon the facts, and none other.

First. That the defendant herein, H. Hackfeld & Co, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii.

Second. That on the 12th day of November, A. D. 1902, within the district and Territory of Hawaii, the said defendant was the agent of the steamship *Korea*, a vessel plying between the State of California and the Empire of Japan.

Third. That on the 28th day of October, A. D. 1902, the said steamship *Korea* did bring into the port of San Francisco, in the United States, one Terujiro Yamoto and one Hachiero Irie, two Japanese persons from Yokohoma, in the Empire of Japan.

Fourth. That on the 29th day of October, A. D. 1902, the said Terujiro Yamoto and the said Hachiero Irie were denied admission into the United States by the board of special inquiry, at the port of San Francisco, in the State of California.

Fifth. That the board so denying admission to the said Terujiro Yamoto and the said Hachiero Irie was regularly constituted, and had jurisdiction to hear and determine the right of the said Terujiro Yamoto and the said Hachiero Irie to land in the United States.

Sixth. That on the said 29th day of October, A. D. 1902, the said board did order the deportation of said Japanese immigrants.

Seventh. That on the 7th day of November, A. D. 1902, said Japanese immigrants were taken from the port of San Francisco to the steamship *Korea* and were received on board of said steamship for the purpose of deporting them to Japan.

Eighth. That on the 12th day of November, A. D. 1902, the said steamship *Korea* did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship *Korea* at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship *Korea*; that said escape did not occur by *vis major* or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.

> Ninth. That the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan.

A jury was waived, and upon the facts set forth in the stipulation the court found "that said defendant, H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, did, on the 12th day of November, A. D. 1902, refuse and neglect to return to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America." (Rec., p. 16.) The court thereupon adjudged the defendant guilty and imposed a fine of $600. An appeal was taken to the circuit court of appeals for the ninth circuit, and the judgment of the district court was therein affirmed. The argument of the plaintiff in error in the circuit court of appeals was addressed solely to the construction of the statute under which the complaint was brought. The claim was made that notwithstanding the exact manner of the escape was detailed in the stipulation, the conclusion "that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant," precluded the trial court from making a finding of negligence; and with the element of negligence out of the case that a conviction could not be had under the statute. The

circuit court of appeals held that the trial court was not bound by the conclusion of the eighth stipulation just quoted, "nor was it prevented thereby from placing upon the stipulated facts the construction which in in its judgment they should properly bear," and affirmed the judgment of the trial court without considering whether a conviction could have been had in the absence of evidence of negligence.

The petitioner here claims (1) that the closing recital in the eighth stipulation was an ultimate fact, and that the court was bound thereby; and (2) to sustain a conviction under said section 10 it was necessary to show negligence on the part of the transportation company.

ARGUMENT.

I.

The Recital in the Stipulation that Defendant was not Guilty of Negligence was a Conclusion of Law and not an Ultimate Fact.

The immigration act of which section 10 is a part, was passed for the protection of the people of the United States, and to correct in a measure the abuses that had grown up under the immigration system. Thousands of paupers, criminals, and diseased persons were being landed in our midst, constituting a danger and menace to the country. Transportation companies were the great beneficiaries under the system, and were largely responsible through their methods of advertising and disregard of the welfare and interests of this country, for such unsatisfactory conditions.

Section 1 of the act mentions in detail the classes of persons who shall be denied admission. Sections 3 and 4 denounce improper advertising by transportation companies, under penalty. Section 6 provides that any person who brings or aids in bringing into the United States by vessel or otherwise, any alien not lawfully entitled to enter, shall be deemed guilty of a misdemeanor, and punished.

It was stipulated that the alien immigrants in this case were brought here by this company, and were properly denied admission. They were then members of one of the excluded classes. It is further stipulated that these immigrants were taken on board defendant's vessel to be deported. The defendant was then performing a duty imposed by section 10, namely, returning "to the port from which they came," immigrants whom the company should not have brought here. The eighth stipulation goes on to say that "on the 12th day of November, A. D. 1902, the said steamship *Korea* did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship *Korea* at said port of Honolulu, the said immigrants were still on board said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight, of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of

November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; * * *"

All the circumstances surrounding the escape are here detailed. If it was the design and purpose of the stipulation to preclude a finding of fact by the court, why were these circumstances set out, and why did the stipulation contain more than a mere allegation that the escape occurred without the fault or negligence of the defendant? This company had brought to our shores immigrants who were not entitled to admission, and who were properly and legally ordered deported on the vessel bringing them here, and upon the vessel coming to anchor "at said port of Honolulu" a short distance only from the shore, locked these immigrants in a room and left them for five hours without guard, when there were portholes large enough to furnish a means of escape, and through which they probably did escape, unless they were able to unlock the unguarded door. If these facts do not constitute negligence on the part of the transportation company, then it is difficult to conceive of a state of facts which would constitute negligence.

Moreover, the rule is frequently stated "that where the facts are undisputed, admitted, or conclusively proved, negligence is a question of law for the court." (21 A. & E. Enc. Law, 506; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S., 408; *Elliott* v. *Chicago, Mil. & St. Paul Ry. Co.*, 150 U. S., 245; *Union Pac. Ry. Co.*, v. *McDonald*, 152 U. S., 262; and *So. Pac. Co.* v. *Pool*, 160 U. S., 438.)

But the petitioner contends that the court should have entirely ignored the admitted facts in the case, accepted a construction clearly inconsistent therewith, and thus permitted a usurpation of its functions.

II.

Assuming the Recital in the Stipulation that Defendant was not Guilty of Negligence as an Ultimate Fact, such a Stipulation would have been Void as against Public Policy.

The alien immigrants in this case, according to the stipulation, were properly denied admission and properly ordered deported. Under said section 10 of the law of 1891, it was the legal duty of the transportation company to receive back on board such aliens, and to return them to the port from which they came. The transportation company was then the official custodian of these alien prisoners, and as such was charged with more than ordinary responsibility with respect to preventing their escape. It is well settled at common law that an officer who keeps a prisoner so negligently that he escapes is answerable for his neglect as a crime. (Bishop on Cr. Law, vol. 1, edition 1865, sec. 392.)

"An escape implies the negligence or connivance of the officer. And so strongly does the law incline to presume negligence in the officer where an escape occurs, that, though such prisoner should break jail, yet it seems that it will be deemed a negligent escape in the jailer, because it will be attributed to a want of due vigilance in the jailer or his officers." (Bishop Cr. Law, vol. 2, edition 1865, sec. 1056.)

"A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. And, from the instances of this offense mentioned in the books, it seems that where a party so escapes, the law will presume negligence in the officer." (Russell on Crimes, 8th Amer. ed., vol. 1, 420.)

The rule is thus stated in *Smith* v. *The Commonwealth* (59 Pa. St., 325):

> The rule in civil cases is—and in criminal it is certainly not less strict—that it is the sheriff's duty to keep every prisoner taken by him by virtue of a writ of execution in *salva et arcta custodia*, for if the sheriff allow a defendant arrested by him on a ca. sa. to go at large for the shortest time, either before or after the return-day of the writ, without consent of the plaintiff, it is an escape, for which the sheriff is answerable.

The transportation company having been the custodian of these alien immigrant prisoners, and having permitted them to escape, negligence was to be presumed. The court was clearly right upon the admitted facts in ruling that defendant was guilty of negligence.

San Francisco Lumber Company v. *D. H. Bibb et al.* (139 Cal., 325–326):

> When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it.

Berkshire v. *The Missouri Pacific Railway Company* (28 Mo. Ap., 225–228):

> It is stated in the agreed statement of facts that the act of 1879 was in force in Cass County at the time mentioned, viz, August 12, 1883. This statement is not the statement of a mere fact, but is also in a certain sense the statement of a conclusion of law. We shall treat the statement as to the fact as conclusive upon us, but surely the statement as to the conclusion of law should not bind us if contradicted and refuted by the public laws of the State. For instance, if the act of 1879 was at the date stated no longer in force in this State by reason of having been repealed by an act of the legislature of the State in 1883, should we treat the act of 1879 as in force because the parties to this case have so agreed and stipulated? The question answers itself.

Graves v. *Alsap* (1 Ariz., 274–282):

> We hold that parties to an action can not properly stipulate what the law is that is to govern their case, that courts should not regard such stipulations when made, and we are equally of the opinion that they can not stipulate what the action of a law-making body was in a given case, and from the stipulations thus made ask the court to determine whether a general law is or is not in force.
>
> The agreement of parties that a statute with certain provisions is in force does not make it in force. * * * In deciding the issue raised * * * we shall not regard the stipulation.

Detroit v. *Beckman* (34 Mich., 125):

> On the brief for the defendant in error it is stated that "no question is made as to the liability of the city of Detroit for the injury set out in the declaration. The only questions arise upon charges and refusals to charge as to what constitutes negligence," etc. We do not find this distinctly admitted on the part of the city, and if it were, the admission of a rule of law could not obligate the court to accept and act upon it.

Murphy v. *People* (3 Colo., 147):

> The costs in criminal cases must be taxed according to law, and not by agreement. Such an agreement is without any consideration, unless the consideration may be mitigation of sentence; and such a consideration between court and convict, or between the prosecuting officer and the convict, would manifestly be void, being against public policy as substituting the bargain with the convict instead of the judgment of the court as the measure of punishment to be inflicted.

To the same effect are *Attorney-General* v. *Rice*, 64 Mich., 385; *Jones* v. *Madison County*, 72 Miss., 777; *Holmes* v. *Johnston*, 59 Tenn., 155; and *Happel* v. *Brethauer*, 70 Ill., 166.

The admission of specific facts nullifies a reservation denying their legal effect. (20 Enc. Pl. and Prac., 661; *Haight* v. *Green*, 19 Cal., 113.)

Surely it would have been against public policy for the court, upon whom the ultimate responsibility rested

of weighing these stipulations and determining whether a law of the United States had been violated, to have permitted parties to bind the court by a conclusion absolutely inconsistent with the facts, and thereby not only escaped the consequences of a violation of the law, but established a precedent which would have enabled others to do the same.

III.

The Defendant was Properly Adjudged Guilty by the Trial Court even if we Assume that there was no Evidence before the Court upon which a Finding of Negligence Could be Based.

Section 10 under which the prosecution in this case was commenced formed a part of the immigration act of 1891, as previously pointed out. The Executive Department charged with its enforcement took the position immediately upon its passage, that the spirit and language of the act demanded that transportation companies bringing to our shores immigrants whose admission the law prohibited were chargeable at all hazards with the responsibility for the return of those immigrants to the ports from which they came.

In 1893 the circuit court of appeals for the first circuit, in the case of *Warren* v. *United States* (58 Fed. Rep., 559), sustained the interpretation thus placed upon section 10 by the Treasury Department. One Frederick Warren was prosecuted in the district court for the district of Massachusetts for neglecting to detain on board his vessel immigrants who had been ordered deported. At the trial evidence was offered

that the escape of the immigrants occurred without any negligence on the part of the defendant. The evidence was excluded as immaterial, and the defendant convicted. The circuit court of appeals carefully reviewed the whole act and ruled that the agent of a vessel who is ordered to detain on board and return immigrants unlawfully brought to this country is bound to do so at all hazards, and will only be relieved by *vis major* or inevitable accident.

The court said (p. 562):

> We can not doubt, after thus examining the statute, that the tenth section imposes on masters, owners, agents, and consignees absolutely the duty to do the things required of them respectively. It admits of no excuse. They must at their peril conform to the provisions of the statute. They took the risk, when they brought the alien from a foreign port, that he would be adjudged not lawfully suitable to be admitted here, and must be taken back. The statute is analogous to acts regarding the sale of unwholesome or diseased provisions, or the keeping and storage of dangerous explosives, or the sale of intoxicating spirits. The safety and protection of the public is the end sought. Upon everyone rests the duty to see to it that no act or omission of his shall endanger that safety and if he fails of the full performance of that duty, good intention, or the absence of evil intention, will not excuse him. The responsibility may be regarded similar to that resting upon a sheriff in case of an escape. He

> can not excuse himself by showing that he had exercised care to keep his prisoner. Notwithstanding this view of the aims and purpose of the statute, if it can not without violence be construed so as to effect its intention, it will be found a case where the legislature, by inadequate or inconsistent expression, has fallen short of its design. And in support of the contention that this is such a case, stress is laid on the expression "neglect to detain;" but we have no doubt that, in view of the general purposes of the statute, the word "neglect" must here receive a common and popular signification, as the equivalent of "fail" or "omit." The employment of the term "neglect" in this sense is neither infrequent nor unfamiliar, and assigning to it here any more restricted or narrow definition would defeat the whole end of the statute, a result to be tolerated only when necessary. It follows, therefore, that the rulings of the court below were correct and the judgment must be affirmed.

This construction of the law has been followed by the administrative officers down to the present time.

In 1895 a prosecution was commenced in the district court for the eastern district of Pennsylvania, under the eighth section of the law, charging the defendant "with knowingly and negligently landing or permitting to land certain alien immigrants at the port of Philadelphia on the 14th day of July, 1895, contrary to the form of the act of Congress in such case made and provided." (*United States* v. *Spruth*, 71 Fed.

Rep., 678.) The material part of section 8 reads as follows:

> * * * It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeaner and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment

In view of the language of section 8, the court ruled that to justify a conviction under that section it was necessary to prove willful or negligent permission to escape. It is true, as pointed out in petitioner's brief, that the court took occasion to refer to the decision in the Warren case, which was, as we have seen, founded upon a different section of the law; but this reference was gratuitous, and clearly dicta.

In 1903 Congress found it necessary to carefully revise the immigration laws, which resulted in the act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States." (32 Stat., 1213.)

The part of section 8 of the act of March 3, 1891, previously quoted, became section 18 of the act of March 3, 1903. It is significant in view of the de-

cision of the district court for the eastern district of Pennsylvania above referred to, that the words "either knowingly or negligently" were omitted in the revised act. This clearly indicates that Congress intended to charge transportation companies with the responsibility of preventing, at all hazards, the landing of aliens into the United States at any other time or place than that designated by the immigration officers.

Section 10 of said act of 1891, having received a judicial construction in 1893 in accordance with the evident scope and purpose of the act, and having been executed in accordance with that construction, was reenacted as section 19 of the act of 1903. This we contend is conclusive on the question of the intent of Congress. It is perfectly apparent that Congress had in mind each of the decisions referred to; and it will be remembered that the court in the Spruth case took occasion to criticise the decision in the Warren case. Congress, with full knowledge of this, omitted in the revised act the words which were responsible for the adverse decision in the Spruth case, and *reenacted* section 10, which had received a construction in harmony with the intent of Congress and the spirit of the act. The act of 1903 was therefore a direct legislative affirmance of the construction theretofore given to section 10 of the act of 1891. (See *Vanderbilt* v. *Eidman*, decided February 20, 1905.)

An analysis of sections 20 and 21 of the revised act of 1903 discloses additional reasons for the view

taken that Congress used neglect in this act in the sense of omit. These sections are as follows:

> SEC. 20. That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came, at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section one of this act
>
> SEC. 21. That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section twenty of this act, or, if that can not be so done, at the expense of the immigrant fund provided for in section one of this act; and neglect or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of the Treasury to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this act.

It will be noticed that under section 21, "neglect or refusal * * * to take on board, guard safely, and return to the country whence he came, any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this act."

It is well settled that "the object of all interpretation and construction of statutes is to ascertain and carry out the intention of the lawmakers, and when the intention is ascertained it must always govern." (26 A. and E. Enc. Law, 597.)

The fact that this law was enacted in 1891, immediately construed by the Treasury Department, and that construction adopted and approved by the circuit court of appeals for the first circuit, and followed down to the time of the revision by Congress in 1903 of the immigration laws, when the section was reenacted in that revision, must be held to be an adoption by Congress of that construction.

> The contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning, and should not be disregarded except for cogent reasons. (26 A. & E. Enc. Law, 635; *Stuart* v. *Laird*, 1 Cranch, 299; *Edwards* v. *Darby*, 12 Wheat., 206; *United States* v. *State Bank*, 6 Pet., 29; *Cooley* v. *Board of Wardens*, 12 How., 299; *Union Ins. Co.* v. *Hoge*, 21 How., 35; *Havemeyer* v. *Iowa County*, 3 Wall., 294; *United States* v. *Gilmore*, 8 Wall., 330.)

In *United States* v. *Moore* (95 U. S., 760–763), the court, through Mr. Justice Swayne, said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *McDaniel*, 7 id., 1.) The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

In the case of *United States* v. *Johnston* (124 U. S., 236–253) Mr. Justice Harlan, speaking for the court, said:

> In view of the foregoing facts the case comes fairly within the rule, often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.

In the case of *Pennoyer* v. *McConnaughy* (140 U. S., 1–23) the court said:

> The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our juris-

prudence that no authorities need be cited to support it.

To the same effect are *Burrow Giles Lith. Co.* v. *Sarony*, 11 U. S., 53; *Brown* v. *United States*, 113 U. S., 568; *The Laura*, 114 U. S., 411; *United States* v. *Philbrick*, 120 U. S., 52; *United States* v. *Hill*, 120 U. S., 169; *Schell* v. *Fauche*, 138 U. S., 572; *Heath* v. *Wallace*, 138 U. S., 573; *United States* v. *Alabama G. S. R. Co.*, 142 U. S., 615; *Swift's case*, 14 C. Cls. R., 208.

While it is true that penal statutes should be construed strictly, it is equally true that they will be construed so as to give effect to the legislative intent, and where that intent is clear, courts will not construe a statute with such technicality as to defeat its purpose.

In the case of *United States* v. *Hartwell* (6 Wall., 385–397), the defendant, a clerk in the office of the assistant treasurer of the United States at Boston, loaned a large amount of money, with the safe-keeping of which he was intrusted. He was indicted for embezzlement under the sixteenth section of the act of August 6, 1846, which provides in part that "if any of the said officers shall loan any portion of the public moneys * * * every such act shall be deemed an embezzlement." It was contended that the defendant was merely a clerk, and that the section drawn in question applied to "principal officers" only. The court said:

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It

is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent (pp. 395–396).

In the recent case of *Hawaii* v. *Mankichi* (190 U. S., 197) it was said:

> If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires, amendment 5, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, amendment 6, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But, there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body?

There is analogy between the case under consideration and that of *Johnson* v. *Southern Pacific Company*, decided by this court December 19, 1904, in which Mr. Chief Justice Fuller, speaking for the court, said:

> The primary object of the act was to promote the public welfare by securing the safety of employees and travellers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the

revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How., 197; *United States* v. *Stowell*, 133 U. S., 1, 12, and cases cited. And see *Farmers' National Bank* v. *Deering*, 91 U. S., 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.), 539.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." (*United States* v. *Lacher*, 134 U. S., 624.)

The following cases may also be cited:

United States v. *Lacher*, 134 U. S., 624; *Bolles* v. *Outing Co.*, 175 U. S., 262; *O'Grady* v. *Wiseman*, 9 Quebec Q. B. 169, 3 Can. Crim. Cas., 332; *Indianapolis* v. *Huegele*, 115 Ind., 581; *State* v. *McCrystol*, 43 La. Ann., 907; *State* v. *Glaudi*, 43 La. Ann., 914; *State* v. *Archer*, 73 Md., 44; *Stricker* v. *Pennsylvania R. Co.*, 60 N. J. L., 230; *State* v. *Godfrey*, 97 N. Car., 507; *Hardwick* v. *Vt. Tel., etc., Co.*, 70 Vt., 180.

In support of the proposition that "when an act or part thereof which has received a judicial interpretation is reenacted in the same terms, or where words used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the legislature unless the contrary appears," see 26 A. & E. Enc. Law, 650; *United States* v. *Central Pac. R. Co.*, 118 U. S., 235; *United States* v. *Le Bris*, 121 U. S., 278.

In the case of *United States* v. *Mooney* (116 U. S., 104–106), the court said:

> It is not to be supposed that Congress, in using in the act of 1875 the same language, so far as the present question is concerned, as that employed in the act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three-quarters of a century.

In the case of *The Devonshire* (13 Fed. Rep., 39), which was an admiralty case, a suit was brought to enforce a lien against the British steamship *Devonshire* for penalties alleged to have been incurred by the master and owners by a violation of section 2 of the act of March 3, 1855 (10 Stat., 1017; sec. 4255, R. S.), entitled "An act to regulate the carriage of passengers in steamships and other vessels." The suit was defended on the ground that the vessel in question was a steamship and that the passengers thereon were steerage passengers, and therefore section 4255 of the Revised Statutes was not applicable. It appeared that the statute in question was before the district court for the southern district of New York in 1868, and that it was then ruled that the section was not applicable to steamships. The law was reenacted in 1877 in the language of the original act.

The court said (p. 42):

> But in the light of the decision in the case of *The Manhattan*, and particularly the unqualified reenactment by Congress of section 10 in

1877, after the construction there given to it in 1868, I do not feel at liberty to hold otherwise.

In the case of *Inhabitants of Rutland* v. *Inhabitants of Mendon* (18 Mass., 154), it was ruled that if a provision in one statute which has received a judicial construction be inserted in another the same construction will be given it. Numerous State and Federal cases are cited to support this proposition in the American Digest, vol. 44, col. 2865.

Moreover, if we consider section 10 without reference to the fact that it has received a construction by an executive department which has been sustained by judicial decision and adopted by Congress, we must reach the same conclusion, namely, that alien immigrants improperly brought to our shores, and who are denied admission and ordered deported, must be kept safely by the person responsible for their coming, and chargeable under the law with their return; and if he suffers them to escape, such person has neglected to return them within the meaning of this section.

We contend that the word "neglect" is used here in its ordinary sense, and means to omit. The section provides for, if practicable, the immediate return of an alien on the same vessel; for payment of costs of maintenance while on land and expenses of return by the owner of such vessel; for refusal or neglect by the master, agent, consignee, or owner to return an alien to the port from which he came, and for refusal or neglect to pay the cost of maintenance on land.

"Neglect," says Bouvier (vol. 2, 478), "means to

omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act."

In the case of *Rosenplaenter* v. *Roessle* (54 N. Y., 262–267), where chapter 421 of the laws of 1855, which provides that when the proprietor of any hotel furnishes a safe for money, jewels, or ornaments of guests, and posts a notice stating the fact in the rooms, if the guests shall neglect to deposit in such safe, the proprietor will not be liable for loss, was construed, the court said:

> * * * But in every case where the guest has an opportunity to make the deposit and does not make it, he neglects to make it within the meaning of the statute. To neglect means to omit, as to neglect business, or payment, or duty, or work, and is generally used in this sense. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. It is manifestly in this sense that it is used in this statute. To hold that the guest must be guilty of some actual negligence in not making the deposit would be substantially to nullify the statute.

In *Merrifield* v. *Cobleigh* (4 Cush. Mass., 178–185) Chief Justice Shaw said:

> * * * The condition in the present case is that the estate shall be void if the grantee, her heirs or assigns, shall "neglect" or "refuse" to support the fence.

> Both these terms, in connection with the subject-matter, imply some previous demand, notice, or request, if the fence has decayed or been removed, to replace it, and that the defendant had either "refused" in terms to do the act required or "neglected;" that is, after notice or request, and after a reasonable time allowed for that purpose, had failed to do it. In the present case, it appears that no such demand or request was made or notice given. There was, therefore, no breach of condition, which defeated the estate at the time of the entry of the demandant, and this action can not be maintained.

The case of the *Atchison, Topeka and Santa Fe Railroad Company* v. *Louis Billings* (7 Kans. App. Rep., 399) is an answer to the contention of petitioner that the word neglect does not mean omit. In that case section 1259 of the General Statutes of 1899 of Kansas imposed a duty upon a railroad company to build cattle guards where necessary, whenever its line of railroad passed through a fenced field. The statute provided that for failure to build such cattle guards the injured party might recover all damages he had sustained by reason of such failure, and that it should only be necessary to prove "neglect or refusal on the part of the company to construct such cattle guards." The court ruled that neglect, as used in the law, implied knowledge, but not necessarily notice of any particular kind; that if knowledge was brought to the company, neglect was sufficiently proved. It will thus be seen that the

words neglect and refuse frequently imply omission after notice.

See also *Willoughby* v. *Willoughby*, 9 Q. B., 923; *Leslie* v. *Lorillard*, 31 Hun, N. Y., 305; and *Daniels* v. *Ellison et al.*, 3 N. H., 279.

A ruling placing upon the Government the burden of proving actual negligence on the part of transportation companies responsible for the escape of alien immigrants ordered deported would in effect render it practically impossible to obtain a conviction for a violation of said section 10, for the reason that the only information the Government would have or be able to obtain would be the bare fact of the escape. Obviously such a result would defeat the purpose of the statute, and all the provisions for sifting out and sending back undesirable immigrants would amount to nothing. Surely had Congress contemplated any such result, provision would have been made for the deportation of these immigrants by immigration officials at the expense of transportation companies. However earnestly petitioner may contend that this law should not be construed so as to charge transportation companies at all hazards with the responsibility of returning undesirable immigrants, it is undoubtedly true that petitioner would much prefer occasionally to pay a small fine under such an interpretation of the law than to pay the cost of deportation by the Government of *all* undesirable immigrants.

And since the evil aimed at in this statute, as the court remarked in the Warren case (*supra*), "was the

absolute exclusion from this country of all immigrants of the classes named in the act," we respectfully submit that the decision of the circuit court of appeals should be affirmed.

CHARLES H. ROBB,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 164.—October Term, 1904.

H. Hackfeld and Company, Limited, Petitioner, vs The United States. | On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 3, 1905.]

This case is here on writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, to review a judgment of that court, affirming a judgment of the District Court for the District of Hawaii, in which the petitioner, Hackfeld and Company, was adjudged guilty of a violation of section 10 of the act of March 3, 1891, (26 Stat. 1084,) and to pay a fine of $600, for neglecting to return to the port from whence they came, Yokohama, Japan, two certain Japanese immigrants unlawfully in the United States, in violation of the act of Congress. The conviction was upon information filed and trial had to the court, a jury having been waived, and was upon a stipulated finding of facts, agreed upon by the attorney for the United States and the petitioner. After statements as to the corporate character of the defendant company, and that it was the agent of the steamship Korea, a vessel plying between the State of California and the Empire of Japan, it is stipulated that the vessel brought into the port of San Francisco in the United States two certain Japanese immigrants from Yokohama, Japan, on October 28, 1902; that on the following day, October 29, 1902, the said Japanese were denied admission into the United States by the board of special inquiry at the port of San Francisco, and the said board, being duly appointed and authorized in the premises, ordered the deportation of the said Japanese immigrants. That on the seventh day of November, 1902, the said Japanese were received on board the vessel Korea for transportation to Japan. The stipulation then recites the following facts:

"That on the 12th day of November, A. D. 1902, the said steamship Korea did arrive at the port of Honolulu, in the District and Territory of Hawaii; that at the time of the arrival of said steamship Korea at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th

day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship Korea; that said escape did not occur by *vis major* or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.'

"That the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan."

From the conviction in the lower court upon these stipulated facts a writ of error was taken to the Circuit Court of Appeals for the Ninth Circuit. In that court, without passing upon the question whether the statute justified conviction without proof of negligence, it was held that the judgment of conviction should be affirmed because the facts recited left room for the inference that the petitioner was found guilty of negligence in putting the Japanese in the room without taking the necessary precautions against escape through the portholes. The stipulation that the escape did not occur by reason of negligence or lack of proper care on the part of the officers of the vessel it was held did not bind the court nor prevent it from placing upon the facts stipulated the construction which, in its judgment, they should properly receive. (125 Fed Rep. 596, 60 C. C. A. 428.)

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the Court.

The Circuit Court of Appeals disposed of this case upon the view that the judgment of conviction would have been warranted upon the evidentiary facts stipulated, and that the stipulation, in so far as it stated that the escape of the immigrants could not have been reasonably anticipated by the master or officers of the steamship, and did not occur by reason of any negligence or want of proper care upon their part, was the statement of a mere conclusion, not binding upon the court, and would not prevent it from rendering an independent judgment upon the facts stated. We cannot take this view of the case. It may be conceded that where the facts are all stated, the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but we know no rule of public policy which will prevent the United States Attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. It is to be presumed that such an officer will do his duty to the Government and not stipulate away the rights of the prosecution. The question of negligence in a given case is not usually reduced to one of law and, as is the case here, its presence or

absence is the ultimate question to be decided between the parties. Ordinarily, the issue of negligence is one of fact to be determined by the jury. This proposition has been so often adjudicated in this court that it is only necessary to refer to the cases in passing. It has been held that where there is no reasonable doubt as to the facts or the inference to be drawn from them, the question becomes one of law. Where the state of facts is such that reasonable minds may fairly differ upon the question as to whether there was negligence or not, its determination is a matter of fact for the jury to decide. (*Grand Trunk R. R. Co.* v. *Ives*, 144 U. S. 408–417; *Baltimore & Ohio R. R. Co.* v. *Griffith*, 159 U. S. 603–611; *Texas & Pacific R. R. Co.* v. *Gentry*, 163 U. S. 353–368; *Warner* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 339.)

The evidentiary facts in the stipulation upon which this case was tried are not very fully set forth, and the Government and the defendant were content to stipulate that the method of escape through the portholes (assuming that it was by this means the immigrants escaped) could not have been reasonably anticipated by those in charge of the Korea, and that the escape did not occur by reason of any negligence or lack of proper care upon the part of the officers of the vessel or the defendant.

We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.

We come then to the important question in this case, as to the construction of the statute under which the petitioner was convicted and fined. The conviction was under section 10 of the act of March 3, 1891, (26 Stat. 1084,) which is as follows:

"SEC. 10. That all aliens who may unlawfully come into the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than three hundred dollars for each and every offence; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

The question is as to the effect of this requirement upon shipowners who have wrongfully brought aliens into this country, and who, having received them on board the vessel for the purpose of returning them to the place from whence they came, shall neglect to detain them thereon, or neglect to return them. In this case, the court found the defendants guilty as charged in the information in that they refused and neglected to return to

the port from whence they came the two Japanese immigrants. It is the contention of the Government that this statute requires of persons, situated as were the defendants, the absolute duty of returning to the place from whence they came, immigrants unlawfully brought into the ports of the United States; and that the word "neglect" as used in this statute is equivalent to the word "fail" or "omit," and the return of the immigrants is required at all hazards, and the vessel owner will only be relieved when the default is the result of *vis major* or inevitable accident. This contention finds support in the case of *Warren* v. *United States*, (58 Fed. Rep. 559,) decided in November, 1893, in the Circuit Court of Appeals for the First Circuit, in which section 10 of the act of March 3, 1901, was directly under consideration. We are cited to no other cases construing this section wherein it was directly involved, although in *United States* v. *Spruth*, (71 Fed. Rep. 678,) a case in the District Court for the Eastern District of Pennsylvania, involving the eighth section of the same act, Judge Butler criticized the decision in the Warren case, and expressed doubts as to the construction therein given to the language of a criminal statute. The word "neglect" as sometimes used, imports an absence of care or attention in the doing or omission of a given act, or it may be used in the sense of an omission or failure to perform some act. "To "neglect" is not always synonymous with to "omit." Whether the use of the term is intended to express carelessness or lack of attention required by the circumstances, or to express merely a failure to do a given thing, depends upon the connection in which the term is used and in the meaning intended to be expressed. These meanings find illustration in the lexical definition of the word, as well as the adjudicated cases in which it has been construed when applied to different subjects. In Webster's Dictionary the verb "neglect" is defined as meaning "not to attend to with due care or attention; to forebear one's duty in regard to; to suffer to pass unimproved, unheeded, undone." In the Standard Dictionary the word is defined as meaning "to fail to perform through carelessness." And in the Century Dictionary: "1. To treat carelessly or heedlessly; forbear to attend to or treat with respect; be remiss in attention to or duty toward; 2. To overlook or omit; disregard. 3. To omit to do or perform; let slip; leave undone; fail through heedlessness to do or in doing (something.)"

As defined in the penal statutes of several of the States, the word "neglect" is said to import "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." (Words and Phrases Judicially Defined, vol. 5, p. 4940.)

While the term may be used as indicative of carelessness, it may also merely mean an omission or failure to do or perform a given act. This meaning finds illustration in the case of *Rosenplaenter* v. *Roessle*, (54

N. Y. 262, 266,) in which a guest at a hotel who failed to deposit his valuables for safekeeping as required by the statute, was held to have "neglected" to deposit within the meaning of the law, for, having the opportunity so to do, he omitted to avail himself of this means of safekeeping. An illustration of the meaning of the term when indicative of a want of care is found in *Watson* v. *Hall*, (46 Conn. 204, 206,) in which case it was held that in a statute by which a grand juror is made subject to prosecution when he shall neglect to make seasonable complaint of a crime, the word "neglect" was construed to be used in the sense of omission from carelessness to do something that can be done and that ought to be done, and the grand juror was held not to have neglected the complaint when, after investigation, he had become convinced that the offence should not be prosecuted.

In which sense is the term used in this statute? This is a highly penal statute and we think the well-known rule, as laid down by Mr. Chief Justice Marshall in the case of *United States* v. *Wiltberger*, (5 Wheat. 76, 95,) is applicable here:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment."

It is true that in the construction of penal statutes, as well as others, the object and purpose is to ascertain the correct meaning of the act with a view to carrying out the expressed intent of the legislature, and penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature. (*United States* v. *Lacher*, 134 U. S. 624.) We are to search for the true meaning of this statute, remembering that it undertakes to define an offence which is not to be broadened by judicial construction so as to include acts not intended by Congress. The statute imposes upon one who has brought immigrants into the United States not permitted to land here, the duty of returning them to the place from whence they came, with a penalty by fine in case the duty is neglected. If, by this requirement, it was intended to make the shipowner or master an insurer of the absolute return of the immigrant, at all hazards, except when excused by *vis major* or inevitable accident, it would seem that Congress would have chosen terms more clearly indicative of such intention, and instead of using a word of uncertain meaning, would have affixed the penalty in cases wherein the owner or master *omitted* or *failed* to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel, but had permitted the escape, either with or without fault upon his part. Where the statute

permits of a construction which does not require this absolute insurance of the return of the immigrant, but holds the shipowner to the care and diligence required by the circumstances, we do not feel inclined to adopt the construction least favorable to the accused. This statute imports a duty, and in the absence of a requirement that it shall be performed at all hazards, we think no more ought to be required than a faithful and careful effort to carry out the duty imposed.

It is urged by the Government that in view of the re-enactment of section 10 as section 19 of the act of 1903, (32 Stat. 1213,) it is to receive a construction in harmony with the judicial interpretation given to the act before the revision. While recognizing the rule that doubtful terms which have acquired through judicial interpretation a well-understood legislative meaning are presumed to be used by the legislature in the sense determined by authoritative decisions, (*The Abbottsford*, 98 U. S. 440,) we do not think the rule applies to this case. So far as we know, there has been but one decision, in the *Warren case, supra*, which was doubted in the *Spruth case, supra*. In 1900 the construction of this act was under consideration by the Attorney General of the United States upon a question submitted by the Secretary of the Treasury involving the remission of fines to which the owner or master of a vessel was supposed to be liable under the terms of the act now under consideration. In construing section 10 of the act the Attorney General said:

"But while I assume nothing relative to the facts in this case, with which it is your duty to deal and not mine, I am clearly of the opinion that in a case where every precaution to detain in safe custody and prevent escape has been rigidly taken, and yet in some real and unforeseen emergency an escape has occurred, there is no such neglect as the act contemplates. If the question were regarded otherwise, the act would rather have said ('if any such alien *shall escape* from such vessel, such master shall be deemed guilty of a misdemeanor, and shall be punished.)" (Opinions of Attorneys General, v. 23, p. 277.)

In this state of judicial and official opinion we do not think this act can be said to have received such judicial interpretation as should control its legislative meaning. We think the Attorney General, in the case cited, laid down the true rule, which does not make the shipowner the insurer at all hazards of the safe return of the immigrant, but does require every precaution to detain him and prevent his escape.

It is further urged by the Government that if the burden of proof in cases under this act is placed upon the prosecution, it will be impossible to convict, as the facts and circumstances under which the escape took place are within the knowledge of the defendants alone. We are not dealing with the question of burden of proof in this case, for here it is expressly stipulated that the defendants could not have anticipated the escape by the method employed and were not guilty of any want of care in the prem-

ises. Undoubtedly, the act of Congress should be given a reasonable interpretation, with a view to effect its purpose to prevent the introduction into this country of classes of persons excluded by the immigration laws. If this act should be construed as requiring the return at all hazards of the immigrants, those who are required to perform its mandate will doubtless claim the right to use all the force necessary to avoid the penalty of the law in delivering the immigrant to the country or place from whence he came. What would be the result of such power, it is easy to imagine. It is difficult to see how a shipowner could insure the return of such immigrants without such confinement or imprisonment as may result in great hardship to that class of individuals who may themselves have had no intention to violate any law of this country. We think this statute was intended to secure, not the delivery of the immigrant, at all hazards, but to require good faith and full diligence to carry him back to the port from whence he came. It follows that the judgment of the Circuit Court of Appeals must be reversed and the cause remanded to the District Court with instructions to discharge the petitioner.

True copy.

Test:

Clerk Supreme Court, U. S.